Supreme Court, U.S.
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No. 01-1670

IN THE

Supreme Court of the United States

J. KEVIN MENEILLY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Given that tax fraud sentences depend entirely on the amount of tax loss determined by a judge under a preponderance-of-the-evidence standard, should such sentences continue to be immune from *Apprendi* only because they do not exceed the pre-Guidelines statutory maximum?

Was a defendant denied his Sixth Amendment notice and trial guarantees as construed in *Apprendi* when his sentence for aiding and abetting tax perjury rests on a tax theory, first introduced post-conviction, that constitutes the separately codified tax crime of failure to withhold and pay over, and that depends on facts assumed by the court under the preponderance standard?

PARTIES TO THE PROCEEDING

Petitioner is J. Kevin Meneilly, one of the defendants in the trial below. Respondent is the United States of America.

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Petitioner J. Kevin Meneilly respectfully petitions for a writ of certiorari to review the judgement of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The Second Circuit decision dated October 31, 2001 (App. A) is unpublished and appears in full text at 2001 WL 1388427. The district court's opinion (App. B) is reported at *United States v. Meneilly*, 78 F.Supp.2d 95 (E.D.N.Y. 1999).

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals was entered on October 31, 2001. The Court of Appeals entered an order denying a timely petition for rehearing on December 3, 2001 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to be informed of the nature and cause of the accusation.

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

26 U.S.C. § 7202 provides:

> **Willful failure to collect or pay over tax.**
>
> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

United States Sentencing Guideline § 2T1.6 provides in pertinent part:

> **Failing To Collect or Truthfully Account for and Pay Over Tax**
>
> (a) Base Offense Level: Level from § 2T4.1 (Tax Table) corresponding to the tax not collected or accounted for and paid over.

26 U.S.C. § 7206(2) provides:

> **Fraud and false statements.**
>
> Any person who—
>
> (2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document. . .

> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

United States Sentencing Guideline § 2T1.1 provides in pertinent part:

> **Tax Evasion: Willful Failure to File Return, Supply Information, or Pay Tax**
>
> **Fraudulent or False Returns, Statements, or Other Documents**
>
> (a) Base Offense Level:
>
> (1) Level from § 2T4.1 (Tax Table) corresponding to the tax loss; or
>
> (2) 6, if there is no tax loss.
>
> . . . .
>
> (c) Special Instructions
>
> For the purposes of this guideline—
>
> (1)(A) if the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against the tax, unless a more accurate determination of the tax loss can be made.
>
> . . .
>
> Application Notes:
>
> In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

STATEMENT OF THE CASE

A. Summary

Under the Sentencing Guidelines, a sentence for tax perjury and conspiracy to defraud the Internal Revenue Service is determined solely on the basis of the size of the tax loss, as calculated by the judge after trial using a preponderance of the evidence standard. *See* U.S.S.G. § 2T1.1 (set forth above); § 2T4.1 (Tax Table correlating tax loss to base offense level); § 2T1.9 (directing sentencing court to guideline for substantive crime in conspiracy case). Meneilly's sentence of 57 months is based on the district court's finding, by a preponderance, that the government suffered a tax loss of $2.7 million. That finding followed the court's initial post-verdict determination that tax loss was zero. The government then pressed a new tax theory not asserted at trial which the district court adopted in finding the large tax loss. The district court presided over tax loss hearings for five separate days over a period of nine months.[1]

B. The Tax Loss Proceedings and Findings

Meneilly's sentence was based on a tax loss associated with only two of the counts on which he was convicted: Count One of the Superseding Indictment, which charged that Meneilly was part of a conspiracy to defraud the Internal Revenue Service in violation of 18 U.S.C. § 371, and Count Twelve, which charged Meneilly with aiding and abetting the filing of a false corporation tax return, in violation of 18 U.S.C. § 7206(2). (ER 28-29)[2] The

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[1] The sentencing proceedings took place on December 6, 1999 and March 31, May 19, August 16, and September 6, 2000.

[2] "ER" refers to pages in the excerpts from the record in the appendix to Meneilly's brief in the Second Circuit Court of Appeals. "T" refers to other pages in the trial transcript.

charges relate to the activities of SPSI, a security guard company that Meneilly owned while working full time as general counsel to a local hospital. (T 175, 183) The basic allegation was that SPSI failed to report nearly $9 million over several years. SPSI hid the money by depositing SPSI receipts into the bank account of another company, LMM, and then using that account to pay many of its guards in cash and off the books.[3]

During the first round of sentencing proceedings, the district court followed the Guideline applicable to section 7602 convictions, § 2T1.1.[4] (*See* Sentencing Proceedings of December 6, 1999 and March 31, 2000). Section 2T1.1 provides that the base offense level shall be the level from the tax table (§ 2T4.1) corresponding to "the tax loss," sets forth presumptive rates to be applied to the amount that was underreported (34% of the tax loss if the taxpayer was a corporation, 28% for individuals), but further provides that those presumptions "do not apply" in cases involving "other types of taxes." After a hearing the district court concluded that the tax loss was zero or negligible because all of the income SPSI failed to report was used to pay guards' salaries and so the corporation would have been entitled to a corresponding deduction for the amount of the unreported revenue. (Sentencing Proceedings May 19, 2000;

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[3] Meneilly was acquitted on two other counts stemming from the off-the-books conspiracy that charged him with aiding and abetting the filing of false SPSI returns. Meneilly was also convicted of two counts of falsifying individual tax returns, but the tax loss on those counts was negative—Mr. Meneilly paid more than he needed to—and of a second conspiracy involving the transfer of certain SPSI receipts to his attorney trust account, but the loss attributable to that count, approximately $3,000, was simply added to the court's final calculations.

[4] U.S.S.G. § 2T1.9 is the Guideline applicable to conspiracy to commit tax fraud, which refers the court to § 2T1.1.

Docket Sheet entries 268, 269) That initial tax loss figure corresponds to a base offense level of six and a sentence not requiring incarceration.

To overcome this finding, the government asserted for the first time two new theories based on uncharged conduct. (*See* government letter dated May 22, 2000; Docket Sheet entry 269) The first post-conviction theory, referred to in the district court as the "Withholding Theory," rested on the assumption that SPSI failed to withhold and pay the government the taxes required by the Federal Insurance Contributions Act ("FICA") and Federal Unemployment Tax Act ("FUTA"). *See* 26 U.S.C. §§ 3103, 3111, 3301. Citing *Apprendi*, Meneilly objected to the use of the Withholding Theory on the ground that the failure of SPSI to withhold and pay FICA and FUTA was not charged in the indictment and so Meneilly had no opportunity to defend the claim at trial. Meneilly objected on the further *Apprendi*-based ground that the failure to withhold and pay over FICA and FUTA is a distinct and separate offense under the tax code, 26 U.S.C. § 7202, titled "Failure to Collect and Pay Over Tax" (text set forth above) (*See* Meneilly letter to the district court dated August 14, 2000; Docket Sheet entry 278; Sentencing Proceedings August 16, 2001).

Under the second post-conviction theory, the Recipients' Theory, the SPSI conspirators were charged with assuming that the guards who received salaries from the LMM account would not pay their personal income taxes.

The district court rejected Meneilly's objections and on the fifth day of tax loss hearings (September 6, 2001) proceeded to calculate tax loss on the basis of both the Withholding and Recipient Theories, using estimates to replace missing witnesses and documents. First, the court used a rate of 15% to approximate the "withhold-

ing" losses by rounding off the information obtained from tax tables, not the guidelines, requiring employers to make an FICA contribution of 7.65% of salaries paid and to withhold 7.65% from the employees' salaries. Turning to the Recipient Theory, the district settled on the figure of 15% of the unreported revenue as an approximation of the amount of taxes the guards allegedly did not pay. Approximations were used because the guards did not testify at the sentencing and the government did not supply documents to substantiate the claim of unpaid guard taxes. Combining the two rates, the Court applied the rate of 30% to the nearly $ 9 million in unreported corporate revenue to find, more likely than not, that the tax loss resulting from the off-the-books conspiracy was $2,700,000, which corresponds to a base level of 21 and a mandatory minimum sentence of 37 months (2T4.1(P)).

Meneilly further objected that, even assuming *arguendo* that the tax loss resulting from the conspiracy was $2.7 million, the government also had the burden to prove that the loss was reasonably foreseeable to Meneilly.[5] (*See generally* App. C and Meneilly letter to district court dated June 22, 2001) Meneilly specifically contended that the required forseeability finding did not automatically follow from the jury's verdict because the substantive tax fraud counts based on the off-the-books conspiracy charged Meneilly only with aiding and abetting SPSI's false returns, and on two of those counts Meneilly was acquitted. It was not disputed that

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[5] *See, e.g., United States v. Clark*, 139 F.3d 485, 490 (5th Cir. 1998) (a defendant's sentence "may be based on both the tax loss that he caused directly and the tax loss caused by his coconspirators, if that loss was reasonably foreseeable to the defendant"), *cert. denied*, 525 U.S. 899 (1999). *Accord, United States v. Olbres*, 99 F.3d 28, 32 (1st Cir. 1996). The same requirement emanates from the "relevant conduct" Guideline, § 1B1.3.

Meneilly did not review or sign the return at issue (T 493) and the evidence showed that he delegated the returns to the company's accountant. (T 495-96, 463-66, 603-610) The jury that convicted Meneilly also sent the district court notes indicating their struggle over the question of intent. The jury asked the district court for a definition of "tacitly" and whether "intent to impede" was "a requirement." Even the district court, when denying Meneilly's motion for a judgment of acquittal under Rule 29, acknowledged "[q]uite candidly" that it "had the most trouble with" the sufficiency of the evidence on the aiding and abetting counts. (T. 1243). For these reasons, Meneilly argued that the verdict did not establish the necessary finding of reasonable forseeability. The district court, however, found by a preponderance that the conspiracy losses were reasonably foreseeable by Meneilly. (App. C)

The district court also found by a preponderance of the evidence that Meneilly, as the owner of SPSI, was the "leader" for purposes of Guideline Section 3b1.1(a) and enhanced the sentence by four offense levels, to level 25, which corresponds to a minimum sentence of 57 months' incarceration. (Docket Sheet entry 257; Sentencing Proceedings March 31, 2000)

Meneilly also addressed each of these same arguments in his brief to the Second Circuit Court of Appeals. The Second Circuit, however, endorsed *in toto* the district court's post-verdict findings on tax loss and rejected all Meneilly's *Apprendi* challenges because Meneilly's 57-month sentence, although above the three-year statutory maximum for section 7206 tax fraud, is three months below the five-year statutory maximum for section 371 conspiracies. Citing its own precedent on the question, the Court stated: "A question of fact that affects a defendant's Guidelines sentencing range only below the statu-

tory maximum (and does not trigger a mandatory minimum) is a question to be decided by the sentencing judge." (App. A. p. 11a)

REASONS FOR GRANTING THE WRIT

I.

TAX LOSS IS THE NEXT *APPRENDI* QUESTION THE COURT SHOULD RESOLVE

Proper development of post-*Apprendi* law compels that the Court answer the questions presented in this petition. The first post-*Apprendi* frontier, drug quantity in drug cases, has been explored (*see* Point III, *infra*). This term the Court has taken on the question of aggravating factors in death penalty cases (*see* Point II, *infra*). *Apprendi*'s impact on tax loss is the next major *Apprendi* question that the Court should resolve. The question will affect not only the many federal tax prosecutions but also charges for a wide range of federal "economic" crimes, including all species of fraud, theft and property destruction,[6] in which loss remains the principal sentencing factor.[7]

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[6] Approximately one fourth of all sentences under the Guidelines involve one of these economic crimes. *See* United States Sentencing Commission, *1999 Sourcebook of Federal Sentencing Statistics* 12.

[7] *See* U.S.S.G. §§ 2B1.1 (theft), 2F1.1 (fraud), 2B1.3 (property destruction).

II.

THIS PETITION RAISES AN *APPRENDI* ISSUE NECESSARILY PRESENTED IN CASES THE COURT IS REVIEWING THIS TERM

Earlier this year, the Court granted certiorari to review a capital case that necessarily raises the same kind of *Apprendi* issue that is presented here: whether *Apprendi* is limited to cases in which the sentence does not exceed the statutory maximum.

In *Ring v. Arizona,* 200 Ariz. 267, 25 P.3d 1139 (2001), *cert. granted,* ___ U.S. ___, 122 S.Ct. 865 (Jan. 11, 2002), the Court agreed to review whether it was permissible for a judge, rather than a jury, to make findings necessary to qualify a capital defendant for a sentence of death. The relation to this petition is that in *Ring* the judge-made findings do not raise the statutory maximum (the defendant was already convicted of a capital offense) but determine whether the maximum is imposed. The Court's grant of certiorari necessarily takes on the question, also at the heart of this petition, of *Apprendi*'s applicability when judicial findings do not increase the maximum sentence, but nonetheless "increase the prescribed range of penalties to which a defendant is exposed." *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000) (*quoting*, *Jones v. United States*, 526 U.S. 227, 253 (1999) (Scalia, J. *concurring*)).[8]

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[8] On February 5, 2002, the Court granted a stay of execution pending the decision on the certiorari petition in another death case raising a similar issue. *Bottoson v. Florida*, ___ U.S. ___, 122 S.Ct. 981 (Feb. 5, 2002). The issue in *Bottoson* is whether *Walton v. Arizona*, 110 S.Ct. 3047, which held that Arizona did not have to denominate aggravating circumstances "elements" of a capital crime or permit only a jury to determine them, "was overruled by *Apprendi*, which held that 'for a legislature to remove from a jury the assessment

The Court's decision to review *Harris v. United States*, 243 F.3d 806 (4th Cir.), *cert. granted*, ___ U.S. ___, 122 S.Ct. 663 (Dec. 10, 2001), also affects this case because the question necessarily presented there is also comparable to the questions in this petition. The certified question in *Harris* is, "Given that "brandishing," as used in 18 U.S.C. § 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?"122 S.Ct. at 663. Here, the judge-made findings under a preponderance standard caused an increase in what essentially functions as a mandatory minimum sentence under the Guidelines. Under the Guidelines, if the tax loss is less than $1,700, the defendant does not go to jail. (§ 2T1.1) If, however, the tax loss that the judge finds by a preponderance of the evidence exceeds $5,000, a minimum sentence of four months is triggered (§ 2T4.1(D)) and that minimum increases as the judge-found tax loss increases to the highest minimum of 63 months. (§ 2T4.1(U)) Although these are not "mandatory" minimums in the sense that Congress prescribed them when it criminalized the conduct at issue, the reality of federal criminal sentencing is that the Guideline minimum functions as a "mandatory" minimum: where a statute does not provide a mandatory minimum but the offense conduct corresponds to an offense level in which incarceration is required, that Guideline controls.

Mr. Meneilly's sentence of 57 months' incarceration was just such a mandatory minimum for the judge-determined Guideline offense level of 25.

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of facts that increase the prescribed range of penalties to which a criminal defendant is exposed' violated the Sixth Amendment right to a jury trial.' "

In sum, the Court's decisions to review *Harris* and *Ring* indicate a disposition not to immunize proceedings from *Apprendi* merely because a statutory maximum was not exceeded.

III.

THE CIRCUITS, IN CONFLICT WITH THEIR OWN PRECEDENT AND WITH DECISIONS OF THIS COURT, ARE MISAPPLYING *APPRENDI* IN TAX CASES

The Second Circuit Court of Appeals, joining the error of several other circuits, has taken a blinders-on approach to *Apprendi* in the sentencing of tax crimes, reducing the analysis of the important defendant protections delineated in that decision to a single question: has the statutory maximum sentence been exceeded? The Second Circuit in this case summarily dismissed all of Meneilly's *Apprendi* issues with the single observation that Meneilly's sentence was three months less than the five-year maximum for conspiracy. That disposed of the matter in the Second Circuit because there, "[a] question of fact that affects a defendant's Guidelines sentencing range only below the statutory maximum (and does not trigger a mandatory minimum) is a question to be decided by the sentencing judge, without need for a jury determination." (App. A).

The decision of the Second Circuit Court of Appeals is the latest in a string of erroneous, formalistic readings of *Apprendi* by Circuits addressing the question of tax loss in tax prosecutions. All have held that tax loss need not be decided by a jury, or established by a standard higher than a preponderance of the evidence, if the loss calculations do not increase the sentence beyond the statutory maximum. *See United States v. Sullivan*, 255

F.3d 1256, 1264 (10th Cir. 2001), *cert. denied*, ___ S.Ct. ___, 2002 WL 257162 (Feb. 25, 2002); *United States v. Lindsey*, 14 Fed. Appx. 838, 2001 WL 770433 (9th Cir.), *cert. denied*, 122 S.Ct. 563 (Nov. 13, 2001); *United States v. Garcia-Guizar*, 234 F.3d 483, 488-89) (9th Cir. 2000) (any *Apprendi* error "harmless" if sentence is below the statutory maximum), *cert. denied* 532 U.S. 984 (Apr. 16, 2001); *United States v. Allington*, 13 Fed. Appx. 402, 2001 WL 741711 (7th Cir. 2001) (*Apprendi* is "irrelevant" if tax fraud sentence does not exceed statutory maximum); *United States v. Loe*, 262 F.3d 427 (5th Cir. 2001), *cert. denied*, ___ S.Ct. ___, 2002 WL 233060 (Feb. 12, 2002); *United States v. Lewis*, 235 F.3d 215 (4th Cir. 2000), *cert. denied*, 122 S.Ct. 39 (Oct. 2001); *United States v. Simonelli*, 237 F.3d 19 (1st Cir. 2001), cert. denied, 122 S.Ct. 54 (Oct. 1, 2001).

These Circuit decisions conflict with the substantive meaning of *Apprendi* that the Court appears to have endorsed in its recent certiorari grants (discussed in Point II, *supra)* and *post-Apprendi* remands (discussed in Point IV, *infra*).

The Circuits are in error because tax loss is the *only* factor that drives sentencing in tax fraud cases and so essentially functions as an element of the crime. According to Justice Stevens' majority opinion in *Apprendi*, "the relevant inquiry is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. In tax sentencing, the "required finding" of tax loss creates whatever sentencing exposure may exist. The reason tax loss has not been an element of the crime of tax fraud is to prevent a defendant from garnering a windfall acquittal because the government's proof was off by a few dollars. But the result today is that tax sentences depend entirely

on facts not charged in the indictment, not defended at trial, not established beyond a reasonable doubt, and not determined by a jury. The Circuits cannot be correct, then, in regarding *Apprendi* as "irrelevant" as long as the statutory maximum is not exceeded.

The Circuits must be wrong for the additional reason that, unless their tax loss decisions are corrected, tax loss will be forever immunized from the protections delineated in *Apprendi*, since the Guidelines themselves provide that a sentence must be "not greater than the statutorily authorized maximum sentence." U.S.S.G. § 5G1.1 (c)(1). This irony exposes the fundamental flaw in the Circuit decisions resting on the "statutory maximum" rationale in *Apprendi*: as the Court knows and as the tax loss Guidelines show, the concepts of "minimum" and "maximum" have vastly different meanings under the New Jersey sentencing scheme at issue in *Apprendi* than they do under the federal Sentencing Guidelines.

In holding that mere preponderance is sufficient for determining tax loss, the Circuits, including the Second, are actually in conflict with their own pre-*Apprendi* precedent, in which many upheld higher standards of proof for enhancements that greatly increased a defendant's sentence. *See, e.g., United States v. Kikumura*, 918 F.2d 1084, 1098 (3d Cir. 1990) (clear and convincing standard used at sentencing); *United States v. Shonubi*, 103 F.3d 1085, 1089 (2d Cir. 1997) ("more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence"); *United States v. Townley*, 929 F.2d 365, 369-70 (8th Cir. 1991); *United States v. Restrepo*, 946 F.2d 654, 661 n. 12, 663 (9th Cir. 1991) (*en banc*), *cert. denied*, 503 U.S. 961 (1992).

The injustice resulting from the Second Circuit's decision is acute. No parade of horribles needs to be imagined because they actually occurred at Meneilly's sentencing. The district court imposed a sentence on the basis not merely of facts that the jury did not find, but on the basis of two wholly new theories of tax loss introduced for the first time after the verdict. Neither the Withholding nor the Recipients' Theory was charged in the indictment, no proof was offered to support them at trial, and a jury did not pass on them. Although the court performed a thorough workman's job of juggling numbers and making reasonable estimates to account for unascertainable facts or nonexistent documents (such as tax returns of the guards assumed not to have paid their taxes), the proceedings more closely resembled a civil audit than a criminal proceeding, with a man's loss of liberty resting on estimates and more-likely-than not assumptions.

Exacerbating the injustice is the fact that the court determined not only the size of the loss but also whether that loss was reasonably foreseeable to Meneilly. In this case, where both the court (during the rule 29 motion) and the jury (as its notes show) struggled with the intent question, and where the substantive conviction on which tax loss was based was only aiding and abetting, the judge-made finding on reasonable forseeability was the critical link connecting Meneilly to the large tax loss and long sentence. A fact so integral to sentence length must be found by a reasonable doubt standard.

As long as juries do not decide loss in tax fraud cases, the Government will continue to misuse section 7206 to circumvent prosecutions for tax evasion under 26 U.S.C. § 7201, where loss *is* an element of the crime and must be proven beyond a reasonable doubt before a defendant can be sentenced. This loophole also contravenes Congress's

sentence provisions, which authorize five years for tax evasion but no more than three years for tax perjury.

IV.

THIS COURT'S POST-*APPRENDI* REMANDS INVITE SIMILAR ACTION HERE

Another indication that the Court is disposed to read *Apprendi* without the formalistic limits imposed by the Circuits can be found in the Court's post-*Apprendi* remands in more than fifty criminal cases, approximately half of which involve drugs. In many of those remands, the sentence did not exceed the statutory maximum and yet the Court instructed the lower court to reconsider its decision in light of *Apprendi*. An example is *United States v. Valensia*, 222 F.3d 1173 (9th Cir. 2000), *vacated*, 121 S.Ct. 1222 (2001) (*mem.*) The Ninth Circuit had rejected the defendant's claim that a four-level enhancement, which increased his sentence by nearly eight years, was "extremely disproportionate" and could not be imposed unless the district court applied at least the clear and convincing standard instead of the preponderance standard. 222 F.3d at 1181. The Ninth Circuit rejected the argument in part because the enhanced sentence was "within the maximum sentence for the crime alleged in the indictment," and therefore held that a preponderance of the evidence standard was sufficient. *Id.* The Ninth Circuit even cited *Apprendi* in support of this conclusion, 222 F.3d at 1182 n. 4, but this Court vacated and remanded with instructions to the Ninth Circuit to reconsider its decision in light of *Apprendi*. 121 S.Ct at 1222.[9]

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[9] To avoid burdening the Court with a lengthy citation of nearly 30 drug remands, the Court is respectfully referred to *United*

In sum, the Court has shown that it does not endorse the formalistic interpretation of *Apprendi* the Circuits are using to immunize tax sentences from the reasonable doubt standard and from the Sixth Amendment notice and trial requirements delineated in *Apprendi*.

V.

THIS RECORD IS WELL SUITED TO REVIEW

This case presents an ideal record for addressing the basic *Apprendi* question that tax loss calculations raise because the issue was thoroughly developed, on the facts and the law, after remarkably protracted district court proceedings that the Second Circuit affirmed *in toto*. Evidence, theory, and debate on the competing approaches to tax loss played themselves out in five days of district court hearings spread over nine months. The arguments of counsel and the reasoning beneath the district court's findings of fact and conclusions of law are fully recorded in the transcripts. All permutations of the *Apprendi* arguments were preserved and exhaustively briefed by both Meneilly and the government.

The Second Circuit's decision, because it summarily rejects all of Meneilly's arguments with the single observation that the statutory maximum was not exceeded, squarely and cleanly presents the precise issue this petition asks the Court to decide. Finally, several facts also help fashion the *Apprendi* issue starkly: 1) the introduction of tax loss theories after the verdict, 2) the fact that one of those theories reflects a separately chargeable offense, 3) the fact that the district court first found a tax loss of zero (requiring no incarceration) and months later

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States v. Norris, 143 F. Supp. 2d 243, 247 (E.D.N.Y. 2001), where the late Judge Nickerson catalogues representative citations.

found the tax loss to be $2.7 million (requiring 57 months in prison), and 4) the fact that the district court's findings are based on guesstimates and approximations in lieu of established facts.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED OCTOBER 31, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 00-1631(L), -1540
Filed October 31, 2001

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the thirty-first day of October, two thousand one.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE ROGER J. MINER,
HONORABLE FRED I. PARKER,
Circuit Judges.

Appendix A

UNITED STATES OF AMERICA,

Appellee,

—v.—

J. KEVIN MENEILLY and DAVID RODRIGUEZ,

Defendants-Appellants.

Appearing for Appellant Meneilly:
Joseph W. Ryan, Jr., Uniondale, N.Y.

Appearing for Appellant Rodriguez:
Steven R. Kartagener, N.Y., N.Y.

Appearing for Appellee:
Ruth Nordenbrook, Ass't U.S. Att'y, EDNY,
Brooklyn, N.Y.

Appeals from the United States District Court for the Eastern District of New York.

These causes came on to be heard on the record from the United States District Court for the Eastern District of New York, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

Defendants J. Kevin Meneilly and David Rodriguez appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York following a jury trial before Denis R. Hurley,

Judge, convicting them of conspiring to defraud the Internal Revenue Service ("IRS"), in violation of 18 U.S.C. § 371, and tax perjury, in violation of 26 U.S.C. §§ 7206(1) and/or 7206(2). Meneilly was convicted on two such conspiracy counts ((a) off-the-books payments by Meneilly's security company Security Personnel Services, Inc. ("SPSI"), of wages and other compensation, and (b) fraudulent treatment of payments from SPSI clients); two counts of filing false personal income tax returns, in violation of § 7206(1), and one count of filing a false corporate income tax return for SPSI, in violation of § 7206(2). Meneilly was sentenced principally to 57 months' imprisonment, to be followed by a three-year term of supervised release. Rodriguez was convicted on one conspiracy count (the SPSI off-the-books-payments scheme) and on one count of filing a false personal income tax return, in violation of § 7206(1); he was sentenced principally to 50 months' imprisonment, to be followed by a three-year term of supervised release. On appeal, Meneilly contends principally (1) that the trial court erred in failing to instruct the jury on his defense theories; (2) that the court erred in failing to respond to a question from the jury; (3) that two of the tax perjury counts on which he was convicted should be dismissed for failure to charge a crime; and (4) that the evidence was insufficient to support his conviction on any count. Rodriguez joins the second of these contentions and contends that the evidence was insufficient to support his conviction for conspiracy. Defendants also challenge their sentences. Both contend that the district court applied a version of the Sentencing Guidelines ("Guidelines") that violated their rights under the *Ex Post Facto* Clause of the Constitution. Meneilly contends in addition, *inter alia*, that the court erred in attributing to him

a leadership role in the off-the-books-payments conspiracy, and that his sentence is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). For the reasons that follow, we find no basis for reversal.

The Trial

Meneilly contends that he is entitled to a new trial because the district court failed to instruct the jury (1) that he should be acquitted if he could have believed there was no requirement to report income received by him or SPSI that was diverted to L.M. Management Services ("LMM"), a shell company he was alleged to have established in order to facilitate the conspiracy's off-the-books payments scheme, and (2) that it must acquit him if it found that he relied in good faith on the advice of his accountant Edward Kelly with respect to the preparation of his and SPSI's tax returns. We disagree. A defendant is entitled to a jury charge that reflects any defense theory for which there is a foundation in the evidence. *See, e.g., United States v. Prawl*, 168 F.3d 622, 626 (2d Cir. 1999); *United States v. Johnson*, 994 F.2d 980, 988 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993). But he is "not necessarily entitled to have the exact language of the charge [he] submitted to the district court read to the jury. . . . Rather, a charge is sufficient if it adequately appr[ ]ises the jury of the crime and the defense." *Id.* (internal quotation marks omitted); *see, e.g., United States v. Evangelista*, 122 F.3d 112, 116 (2d Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998). In order to prevail on a contention that the trial court erred in refusing to give requested instructions, the defendant must establish that his own proposed language " 'accurately represented the law in every respect,' " and that the charge actually given, viewed as a whole, prejudiced

him. *United States v. Dove*, 916 F.2d 41, 45 (2d Cir. 1990) (quoting *United States v. Ouimette*, 798 F.2d 47, 49 (2d Cir. 1986), *cert. denied*, 488 U.S. 863 (1988)). The instructions proposed by Meneilly run aground on these principles.

Meneilly asked the court to instruct the jury, *inter alia*, that it "must acquit" him if it found "that LMM received deposits into its bank account." The court correctly noted, however, that Meneilly's defense was that Meneilly believed the moneys in question were going to be declared on LMM's return and hence need not be declared on his, not simply that LMM received the moneys. Further, the instruction proposed by Meneilly was not an accurate statement of the law, given that the jury could find him guilty of conspiring to defraud the IRS by diverting moneys to LMM's account in order to conceal from the IRS the receipt of taxable income by SPSI and by individuals who were given off-the-books payments.

Nor did the court err in refusing to give the instruction proposed by Meneilly that the jury should acquit him if it found he had acted in reliance on the advice of his accountant. The proposed instructions contained factual statements that were unsupported by, and indeed contradicted by, the evidence. There was evidence that SPSI had been making off-the-books payments to some employees since 1974, well before Kelly became Meneilly's accountant. Further, there was no evidence to show that Meneilly solicited or received from Kelly advice as to the existence or nonexistence of a requirement to report moneys that he received or that were spent for his personal benefit. Meneilly himself did not testify; and Kelly testified that he simply used the data that Meneilly gave him and did not discuss with Meneilly what information Meneilly should provide.

Meneilly and Rodriguez also contend that they are entitled to a new trial on the ground that the district court failed to respond to a question from the jury, during deliberations, relating to the intent element of the alleged offenses. The jury asked whether "the intent to impede [is] a requirement." Defendants urged that the question be answered "yes"; the government argued that the proper answer was "no." The court told the jury that its question could not be answered with a simple "yes" or "no" statement, a response that was technically accurate. The indictment alleged that defendants engaged in conspiracies "to defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the [IRS] in the ascertainment, computation, assessment, and collection of the income taxes" of certain persons. An indictment charging a conspiracy to achieve two or more unlawful goals, in the conjunctive, can properly be supported by proof of any of the alleged goals. *See Griffin v. United States*, 502 U.S. 46, 56-57 (1991); *United States v. Thomas*, 54 F.3d 73, 81 (2d Cir. 1995); *cf. United States v. Schiff*, 801 F.2d 108, 114 (2d Cir. 1986) (with respect to alleged violations of substantive statutes worded in the disjunctive, instructions may be phrased in the disjunctive even if indictment in phrased in the conjunctive), *cert. denied*, 480 U.S. 945 (1987). Thus, although the court's response to the jury's inquiry whether "the intent to impede [is] a requirement" may have appeared cryptic to the jury, it was accurate because the answer depended on whether the jury could or would find instead that defendants intended, as alleged in the indictment, to impair, obstruct, or defeat the lawful functions of the IRS. If the jury could not make one of those three findings, it would need to find intent to impede in order to convict; if the jury found an

intent to impair, obstruct, or defeat, it would not need to find an intent to impede. We think it would have been preferable for the court to give this explanation of why it could not answer the jury's question with a simple "yes" or "no"; however, the court did not simply refuse to answer the question. Rather, the court stated, "As that's framed, in other words, as you framed the question, the question cannot be answered yes or no. I don't think that's much help to you, but that's about the best we can do with it because I don't want to speculate as to what you're thinking about and try to answer what I think you may be thinking about." (Trial Transcript at 1774.) The court invited the jury, if it remained puzzled upon the resumption of its deliberations, to "try to articulate as best you can or write as best you can the core problem that you're having, send us another note and we will work on that as well." (*Id.* at 1774-75.) We see no support for defendants' contention that the court in essence told the jury that no finding of intent to defraud the government was required, and we cannot conclude that the court's handling of the jury's question provides a basis for reversal.

Nor is there merit in defendants challenges to the sufficiency of the evidence to support their convictions. In making such a challenge, a defendant bears a heavy burden. *See, e.g., United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923 (1985); *United States v. Martino*, 759 F.2d 998, 1002 (2d Cir. 1985); *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, 457 U.S. 1125 (1982). In reviewing such a challenge, we must credit every inference that could have been drawn in the government's favor, *see, e.g., United States v. Carson*, 702 F.2d 351, 361 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983), and we must affirm

the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt, *see, e.g., United States v. Buck*, 804 F.2d 239, 242 (2d Cir. 1986); *United States v. Taylor*, 464 F.2d 240, 244-45 (2d Cir. 1972). We defer "to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998). Defendants in this case have not met their burden. The district court, in an opinion reported at 78 F.Supp.2d 95 (1999), properly applied these principles in denying defendants' motions for acquittal, which challenged the sufficiency of the government's evidence against them, and we see no basis for reaching a contrary conclusion. Accordingly, we reject defendants' sufficiency challenges substantially for the reasons stated in that opinion.

For the reasons stated in that opinion, we also reject Meneilly's contention that two of the perjury counts against him failed adequately to charge him with crimes.

The Sentences

The district court found that the tax loss caused by Meneilly was between $2,500,000 and $5,000,000, and that the tax loss caused by Rodriguez was between $950,000 and $1,500,000. Using the tax loss table set out in § 2T4.1(L) of the version of the Guidelines that became effective on November 1, 1993, the court concluded that Meneilly's base offense level was 21 and that Rodriguez's base offense level was 19. Defendants note that the immediately preceding version of the Guidelines set lower offense levels for losses of those magnitudes; and, arguing that the last overt act alleged in the indict-

ment occurred on October 22, 1953, defendants contend that application of the November 1993 version to them violated their rights under the *Ex Post Facto* Clause. We disagree.

Where a conspiracy began while one version of the Guidelines was in effect and ended after another version became effective, application of the later version to the coconspirators does not violate the *Ex Post Facto* Clause. *See generally United States v. Eisen*, 974 F.2d 246, 267-68 (2d Cir. 1992), *cert. denied*, 507 U.S. 1029 (1993); *United States v. Story*, 891 F.2d 988, 993-96 (2d Cir. 1989). Further, once it has been established that there existed a conspiracy of which the defendant was a member, his membership is presumed to continue unless and until the defendant proves that the conspiracy was terminated or that he took affirmative steps to withdraw. *See, e.g., Hyde v. United States*, 225 U.S. 347, 369-70 (1912); *United States v. Panebianco*, 543 F.2d 447, 453 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977). Here, the indictment alleged that the off-the-books-payments conspiracy lasted through 1993, and there was no evidence in the record to suggest that the conspiracies were terminated before November 1, 1993, or that either Meneilly or Rodriguez withdrew from the conspiracy or conspiracies of which he was a member. To the contrary, there was testimony that money Meneilly diverted to the LMM bank account in 1993 in furtherance of the off-the-books-payments scheme was not reported on SPSI's 1993 tax return; that return was not filed until 1994. Thus, the off-the-books-payments conspiracy plainly continued past the November 1, 1993 effective date of the version of the Guidelines that was applied to defendants. Accordingly, there was no *Ex Post Facto* clause violation.

Nor do we find merit in Meneilly's contentions that the district court erred in its calculations of his offense level. In reviewing the sentencing court's application of the Guidelines, the appellate court must "accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e) (1994). We will not overturn the court's application of the Guidelines to the facts before it unless we conclude that there has been an abuse of discretion. *See, e.g., United States v. Adelman*, 168 F.3d 84, 86 (2d Cir. 1999); *United States v. Parker*, 903 F.2d 91, 103 (2d Cir.), *cert. denied*, 498 U.S. 872 (1990). The Guidelines require a four-step upward adjustment in offense level if "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Guidelines § 3B1.1(a). "Whether a defendant is considered a leader depends upon the degree of discretion exercised by him, the nature and degree of his participation in planning or organizing the offense, and the degree of control and authority exercised over the other members of the conspiracy." *United States v. Beaulieau*, 959 F.2d 375, 379-80 (2d Cir. 1992). Where the defendant was a top corporate official and participated in criminal conduct rather than stopping it, an enhancement for leadership role is especially appropriate. *See, e.g., United States v. DeRiggi*, 72 F.3d 7, 8-9 (2d Cir. 1995) (per curiam). District courts "should be given 'latitude' concerning their supervisory role findings." *United States v. Napoli*, 179 F.3d 1, 14 (2d Cir. 1999), *cert. denied*, 528 U.S. 1162 (2000).

Although Meneilly contends that the court erred in finding him a leader, we disagree. Meneilly was the sole

owner and president of SPSI; he, *inter alia*, approved and helped in the maintenance of the LMM bank account that was used as a repository for funds diverted from SPSI's accounts in the off-the-books-payments scheme; and he reviewed SPSI's accounts. We see no abuse of discretion in the court's application of the leadership-role adjustment to Meneilly.

Finally, we reject Meneilly's contention, invoking *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that his sentence should be vacated because it was calculated on the basis of a tax loss that was not determined beyond a reasonable doubt by a jury. A question of fact that affects a defendant's Guidelines sentencing range only below the statutory maximum (and does not trigger a mandatory minimum) is a question to be decided by the sentencing judge, without need for a jury determination. *See United States v. Garcia*, 240 F.3d 180, 182-83 (2d Cir.), *cert. denied*, 121 S. Ct. 2615 (2001). The sentence imposed on Meneilly was below the statutory maximum. Accordingly, there was no *Apprendi* violation. Although Meneilly also contends that there was an *Apprendi* violation because his Guidelines sentence "could" have exceeded the statutory maximum for his offenses, his premise is fallacious. The Guidelines themselves provide that a sentence must be "not greater than the statutorily authorized maximum sentence." Guidelines § 5G1.1(c)(1); *see id.* § 5G1.1(a) ("Where a statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.").

Appendix A

We have considered all of defendants' contentions on these appeals and have found in them no basis for reversal. The judgments for conviction are affirmed.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: OLIVA M. GEORGE
Oliva M. George, Deputy Clerk

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 21, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

98-CR-371 (DRH)

UNITED STATES OF AMERICA,

—against—

J. KEVIN MENEILLY, DAVID RODRIGUEZ and RICHARD RODRIGUEZ,

Defendants.

MEMORANDUM AND ORDER

APPEARANCES:

For the Government:
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By: Ruth Nordenbrook, A.U.S.A.

Appendix B

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HURLEY, *District Judge*

Pending are the following post-trial applications:

1. the motion of J. Kevin Meneilly ("Meneilly"), made pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure (the "Federal Rules"), for a judgment of acquittal as to each of the counts of conviction, and a motion, presumably made pursuant to Rule 33 of the Federal Rules, in which he seeks a new trial, based on, *inter alia*, various purported errors in the charge to the jury and the Court's response to a note from the jury;

2. the motion of David Rodriguez ("D. Rodriguez"), made pursuant to Rule 33 of the Federal Rules, seeking a new trial as to Count One based on a post-verdict conversation between his attorney and juror number six in which she indicated that the jury's verdict as to that Count was not her verdict, and a motion, made pursuant

to Rule 29(c) of the Federal Rules, for judgment of acquittal as to the two counts of conviction; and

3. the motion of Richard Rodriguez ("R. Rodriguez"), made pursuant to Rule 29(c) of the Federal Rules, for judgment of acquittal as to the one count of conviction.

THE INDICTMENT

(1) *Introductory Paragraphs.* The grand jury alleged in the introductory paragraphs of the indictment that:

1. Security Personnel Services, Inc., doing business as L.M. Security, Inc. ("SPSI"), was a corporation, the principal business of which was providing security guard services to businesses and institutions in Nassau, Suffolk, Queens, Kings, New York and Bronx Counties.[1] The main office of SPSI was located at 7001 Brush Hollow Road, Westbury, New York. SPSI maintained bank accounts at Citibank and Chemical Bank.

2. The defendant J. KEVIN MENEILLY, an attorney who maintained an office within the premises leased and paid for by [SPSI] at 7001 Brush Hollow Road, Westbury, N.Y., was the majority shareholder of SPSI. The defendant J. KEVIN MENEILLY maintained an attorney escrow account at Republic National Bank (the "Republic Escrow Account"). Edward Kelly

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[1] Henceforth in this decision, the entity which provided guard services shall be identified as "SPSI," not "L.M.S.," which is the designation used in the government's Memorandum in Opposition.

was an attorney and accountant employed by the defendant J. KEVIN MENEILLY.

3. Frank Van Cise was a vice-president of SPSI and directed SPSI's regular daily operations. Marianne Van Cise was the payroll clerk of SPSI.

4. L.M. Management Service, Inc. ("L.M. Management") was an inactive corporation associated with SPSI. SPSI maintained a bank account at Republic National Bank in the name of L.M. Management (the "Republic Account").

5. The defendants DAVID RODRIGUEZ [and] RICHARD RODRIGUEZ . . . solicited construction contractors engaged in construction projects in New York City as customers for the security services of SPSI, and hired, supervised, and paid the SPSI guards who worked at job sites of those customers.

("Introduction to All Counts" portion of Superceding Indictment 98-CR-371(S-2) at 1-2.)

(2) *Count One.* This Count charged all defendants with conspiring from on or about and between January 1, 1991 and December 31, 1993, to defraud the United States "by impeding, impairing, obstructing, and defeating the lawful functions of the Internal Revenue Service (the "IRS") in the ascertainment, computation, assessment, and collection of the income taxes of SPSI and of the defendants DAVID RODRIGUEZ, RICHARD RODRIGUEZ, . . . and of other principals and employees of SPSI."

Appendix B

In furtherance of the charged conspiracy, it was alleged that a substantial portion of the checks received by SPSI from its customers were deposited in the Republic National Bank ("Republic") account of L.M. Management. Checks were drawn against that account and were then exchanged for cash. A portion of the cash so generated was distributed to various employees and principals of SPSI, and to the non-Meneilly defendants. No IRS W-2 or 1099 forms were provided to the income recipients, nor were the income payments reported by SPSI to the IRS.

SPSI did not report the portion of its income diverted to the L.M. Management account at Republic, and the non-Meneilly defendants did not report the "off the books" income each received to the IRS.

(3) *Count Two.* The conspiracy to defraud the IRS charged in Count Two similarly has SPSI as its focal point.

The grand jury alleged (i) that certain monies earned by SPSI were diverted from the corporate coffers by being deposited directly into Meneilly's law office escrow account and (ii) that SPSI paid various personal expenses of Meneilly and members of his family in 1991 and 1992, as well as the rent for his law office and the salaries and medical benefits of his law office employees. SPSI's tax returns for the calendar years 1992 and 1993 did not include the corporate income which found its way into Meneilly's escrow account, nor were the corporate payments made on Meneilly's behalf reported in his personal income tax returns for 1991 and 1992.

(4) *Counts Three through Six.* Counts Three through Six charged D. Rodriguez and R. Rodriguez with filing

false personal income tax returns for the years 1991 and 1992.

(5) *Counts Ten through Fourteen.* Counts Ten through Twelve charged Meneilly with aiding and assisting in the filing of false SPSI tax returns for the calendar years 1991, 1992 and 1993. Counts Thirteen and Fourteen charged him with filing false individual tax returns for the calendar years 1991 and 1992.

JURY VERDICT

Meneilly stands convicted of the charges in Counts One, Two, Twelve, Thirteen and Fourteen. He was found not guilty as to the charges in Counts Ten and Eleven.

D. Rodriguez was convicted of Counts One and Four. He was found not guilty as to Count Three.

R. Rodriguez was convicted of Count Six. He was found not guilty as to Counts One and Five.

COURT'S PRE-VERDICT RULE 29 DECISION

At the close of all the evidence and before the case was submitted to the jury, each of the defendants moved pursuant to Rule 29(a) for judgment of acquittal based on the claimed insufficiency of the evidence as to each of the charged offenses. Those motions were denied in a bench decision given on May 3, 1999, which is hereby incorporated by reference. (Tr. at 1390-1424.)

Appendix B

MENEILLY'S MOTIONS

By way of format, this opinion will address Meneilly's arguments serially by subject consistent with their listing in the table of contents of his Brief in Support.

1. *The Standard Applied by the Court in its Pre-Verdict Rule 29(a) Bench Decision.* The long-settled standard to be employed in deciding a motion for a judgment of acquittal was recently synopsized by the Second Circuit in *United States v. Guadagna* thusly:

> In considering a motion for judgment of acquittal, the court must view the evidence presented in the light most favorable to the government. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Puzzo,* 928 F.2d 1356, 1361 (2d Cir. 1991). All permissible inferences must be drawn in the government's favor. *Id.* In addition, the court must be careful to avoid usurping the role of the jury. As we noted in *United States v. Mariani,* 725 F.2d 862, 865 (2d Cir. 1984), upon a motion for judgment of acquittal, "the Court 'must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' " *Id.* (quoting *Curley v. United States,* 160 F.2d 229, 232 (D.C. Cir. 1947)). Rule 29(c) does not provide the trial court with an opportunity to "substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *Id.* In fact, if the court "concludes that either of the two results, a reasonable doubt or no

> reasonable doubt, is fairly possible, [the court] must let the jury decide the matter." *Curley,* 160 F.2d at 233.

183 F.3d 122, 129 (2d Cir. 1999).

Meneilly posits that the settled standard was not employed by me in deciding his pre-verdict Rule 29(a) motion, thereby rendering the resulting decision fundamentally flawed. He maintains that "the Court's own language in the pre-verdict Rule 29 decision—that 'this is not to say there isn't a legitimate dispute' on the individual counts (Tr. at 1421)—was a finding of reasonable doubt and required acquittal." (Def. Meneilly's Br. in Supp. at 2-3.) Proceeding in reverse order, the notion that the existence of a "legitimate dispute" as to the facts in a criminal case—and/or the inferences to be drawn from the facts—constitutes "reasonable doubt" *per se* is incorrect. *Curley v. United States,* 160 F.2d 229, 233 (D.C. Cir. 1947); *Guadagna,* 183 F.3d at 129; *see also United States v. Nersesian,* 824 F.2d 1294, 1314 (2d Cir. 1987) ("That the evidence permits inferences that are consistent with innocence does not detract from its sufficiency.").

Meneilly's other point, *i.e.*, that the Court employed the wrong standard, may not be so summarily rejected, and warrants discussion. The bench decision begins with the following correct statement of the applicable standard:

> My task this afternoon concerning the Rule 29 motions is to determine whether any reasonable trier of the fact could find that the government has met or has submitted sufficient evidence to support a conviction of each of the crimes charged in this indictment.

Appendix B

> Now, in evaluating the testimony, my role is not to determine credibility or weight. Rather, I am required to construe all the evidence most favorably to the prosecution.
>
> Then the question becomes, so construed, is there any reasonable view of the evidence which would permit the jury to conclude that the government has met its burden of proof.

(Tr. at 1391.)

Notwithstanding the above, however, some of Meneilly's objections to the terminology used thereafter in the bench decision are well taken. For example, I used the term "prima facie case" a number of times later in the bench decision, and used the word "conceivable" (meant by way of an understatement) in describing one reasonable response that the jury could have had to Meneilly's position that his return of SPSI's conceded income to SPSI constituted a "loan" from him to the corporation. Admittedly, the use of such language raises the question of whether the correct standard, as originally stated, was applied in deciding the Rule 29(a) motion. The simple answer is that it was.

The more germane question for purposes of Meneilly's current Rule 29(c) motion is whether a reasonable trier of fact could legitimately conclude, beyond a reasonable doubt, that the government proved each and every element as to each count of conviction. That question will be addressed in the sections that follow.

2. *Adequacy of Evidence as to Count Twelve.*

Count Twelve charges Meneilly with aiding and abetting the filing of a false SPSI corporate income tax return for the year 1993. "The critical falsity with regard

to the 1993 [SPSI] return," as noted by the government, "was that it (1) did not include $75,802.95 in income received by [SPSI] in 1993 from Williams-Sonoma, a security customer of [SPSI], and (2) mischaracterized some $156,200 which was received by [SPSI] from Williams-Sonoma in 1992, and returned, at least in part, in 1993 as (non-taxable) loans from the defendant Meneilly." (Govt's Mem. in Opp'n at 14.)

The elements of the offense, as charged to the jury, are that: 1) Meneilly aided, assisted, counseled, procured, advised or caused the preparation and presentation of a tax return for SPSI for 1993; 2) the return was fraudulent or false as to material matter; and 3) Meneilly acted knowingly and willfully. (Tr. at 1734-37.)

Certain facts are not in dispute, including (1) "[t]he failure of the return to report those monies (the monies received from Williams-Sonoma) as income" (Def. Meneilly's Br. in Supp. at 12) and (2) that the Williams-Sonoma checks payable to SPSI, and endorsed by Meneilly into his escrow account, represent the *same* monies later transferred back to SPSI by Meneilly as "loans." *(Id.* at 22.)

SPSI recorded all monies received from customers in its accounts receivable ledger, thus providing the corporation with a running record of payments made and sums still outstanding for services rendered. Some customer payments, however, were not reported in the corporate cash receipts journal, which was the document used by Vincent Petti ("Petti") in preparing the tax return for 1993, and, incidentally, by his predecessor, Edward Kelly ("Kelly"), with respect to the corporate returns for 1991 and 1992.

The subject payments from Williams-Sonoma were not deposited into an SPSI bank account upon their

receipt—which is the reason "they [were not] reflected" in the cash receipts journal (Tr. at 523-24)—but rather were endorsed by Meneilly and placed directly into his escrow account. Considerable testimony was given that this procedure was utilized in an effort to assure that sufficient funds would be on hand to satisfy an anticipated settlement with the United States Department of Labor arising out of the corporation's failure to pay overtime to its employee guards.

Meneilly argues that the record is devoid of any evidence indicating that he instructed Petti not to use the accounts receivable ledger in preparing the corporate returns, or that he knew Petti was using the cash receipts journal for that purpose. From that, coupled with (1) the reason that the Williams-Sonoma payments were directly deposited into his account and (2) that various witnesses labeled the partial return of those monies by him to SPSI as "loans," Meneilly posits that no reasonable trier of fact could conclude that he knowingly and willfully aided and abetted the preparation of the false corporate return for 1993. That argument, including the evidence upon which it is premised, falls far short of establishing the legal insufficiency of the evidence before the jury with respect to the targeted count. It overlooks the formidable contrary trial evidence, including, *inter alia*, the following testimony of Petti who, as noted, prepared the 1993 SPSI return:

> Q. How did you ascertain based on your work papers that there was this $156,000 increase in loans from shareholders?
>
> A. These were loans that were marked for Mr. Meneilly, that were put into the corporation.

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Q. Calling your attention to Government's Exhibit 121.

. . . .

Q. . . . .

What is the column where the loans are reflected?

A. J. Kevin Meneilly, shareholder's loan.

Q. And what's the first amount entered in that column?

A. $70,000

Q. And when is that—what month was that?

A. March.

Q. What is the second number reflected in that column?

A. June.

Q. And what is that number?

A. 21,000

Q. And finally, what's the last?

A. 65,000

Q. Entered when?

A. In August.

Q. What's the total of those three figures?

A. $156,000

Q. . . . .

The schedule, Government's 121 was prepared by your associate, Miss Palowski; is that correct?

A . Yes.

Q. And then you used the documents that she prepared to prepare the return; is that correct?

A. That's correct. Yes.

Q. Prior to the completion of the 1993 tax return for SPSI, what, if any, discussion did you have with J. Kevin Meneilly concerning those loans?

A. *I discussed these loans and he said that it was loans that he put into the corporation.*

(Tr. at 953-55 (emphasis added).)

A reoccurring theme in both Meneilly's argument to the jury and in support of his current Rule 29(c) motion is that the falsity in the 1993 return was attributable wholly to Linda Koppelman ("Koppelman"), Petti and others, but not to him. Yet, as the above excerpt indicates, a strong argument exists—based on the evidence at trial—that he was a knowing and willful participant in the conceded falsity reflected in the 1993 return. The jury might well have concluded that in advising the accountant that the $156,000 represented "loans that he put into the corporation"—as distinct from the sum's true character as taxable SPSI income—he intended to have that false information reflected in the return. His status as a seasoned lawyer with experience in tax matters[2] would be consistent with such a conclusion by serving to dispel the notion that Meneilly somehow failed to appreciate the significance of his misstatement to Petti.

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[2] The jury heard evidence that Meneilly had an "accounting background," (Tr. at 577), that he prepared the SPSI corporate tax returns before Kelly was hired, (Tr. at 258), and that he prepared tax returns for some of his clients, (Tr. at 473).

In sum, there was ample evidence before the jury as to each of the three elements that the government was required to establish beyond a reasonable doubt to prove that Meneilly violated Section 7206(2) as alleged in Count Twelve.

In addition, in seeking a judgment of acquittal as to Count Twelve based on the purported insufficiency of evidence, two additional grounds for the same relief have been advanced, namely: "The Prosecution's Mangled, Erroneous Theorizing to the Jury" *(see* Def. Meneilly's Br. in Supp., Point II(G) at 33), and "[T]he Court Should Have Given the Good Faith and Reliance on Accountant Charge[ ]" (*id.* Part II(H) at 33).

Initially, it should be noted that each of the two purported errors has been misidentified by Meneilly as a ground for a judgment of acquittal, rather than as a basis for seeking a new trial pursuant to Rule 33. In any event, both grounds lack merit.

A review of the government's summation indicates the absence of any impropriety which would warrant a new trial. With respect to the Court's decision not to give the requested "Good Faith and Reliance on Accountant" charge, my bench ruling during the charge conference is hereby incorporated by reference. (Tr. at 1469-78.)[3]

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[3] The issue of whether Meneilly's request to charge no. 4(d) is "legally correct," *United States v. Prawl*, 168 F.3d 622, 626 (2d Cir. 1999), will not be addressed in view of the absence of a factual predicate for this type of charge to be given.

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3. *Evidence that Meneilly Was a Member of the Conspiracies Charged in Counts One and Two.*

a) *Counts One and Two.* In Counts One and Two, Meneilly is charged with being a member of a conspiracy, the goal of which was to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of income taxes of specified persons and of SPSI.

b) *Elements of Offense.* As to each of the conspiracy counts, the government was required to establish beyond a reasonable doubt: 1) the existence of the conspiracy charged; 2) that Meneilly knowingly and willfully joined the conspiracy; and 3) at least one of the overt acts charged in the indictment was knowingly and willfully committed by at least one conspirator, which overt act was committed to further some objective of the conspiracy. (Tr. at 1704-18.)

c) *Focal Point of Meneilly's Attack as to Each Count.* Meneilly does not attack the existence of the charged conspiracies (Def. Meneilly's Br. in Supp. at, *e.g.*, 38 (Caption of Point III) and 41), nor the commission of the required overt acts. Instead he argues that, viewing all the evidence most favorably to the government, the proof merely establishes "nothing more than Mr. Meneilly's 'mere presence at the scene' or 'mere association with conspirators' . . . which does not establish that Mr. Meneilly knowingly joined and knowingly participated in the conspiracies." (*Id.* at 39.) Given the focus of Meneilly's argument, the following excerpt from *United States v. Jones* is instructive:

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> Because a conspiracy, as the very import of the word suggests, is a clandestine affair whose participants intend to keep it secret, its elements may be established through circumstantial evidence. And, once a conspiracy between to or more defendants is found to exist, though the link between another defendant and the conspiracy need not be strong, the evidence must suffice to permit the jury reasonably to find the element of that defendant's participation—like every element—proven beyond a reasonable doubt. Yet, a defendant who is simply present at the scene of a crime or who knew only of the existence and goals of a . . . conspiracy is not thereby guilty of being a conspirator; the government must prove more than that. It must show the defendant knowingly joined and participated in the objectives of the conspiracy. Although an express agreement to participate in the conspiracy is not needed, the proof must demonstrate at least a tacit understanding between the parties to further the violation of the law.

30 F.3d 276, 281 (2d Cir. 1994) (citations omitted).

d) *Membership in Count One Conspiracy.* The nature of the conspiracy charged in Count One was provided earlier. (*See supra* at 4.) To partially reiterate, the time frame is alleged to have been from January 1, 1991 through the end of December of 1993. The alleged co-conspirators were Meneilly, D. Rodriguez, R. Rodriguez, government witnesses Frank Van Cise ("Van Cise") and Edward Kelly ("Kelly"), and others. The goal of the conspiracy was identified by the grand jury as being an effort to defraud the United States by interfering with the "lawful functions of the IRS in the ascertainment,

computation, assessment, and collection of the income taxes of SPSI" and of D. Rodriguez, R. Rodriguez and "other principals and employees of SPSI."

Meneilly's position is relatively straightforward. Again, he does not claim that there was insufficient evidence to warrant a finding that the conspiracy alleged in Count One existed. Instead, it is his position that the record does not contain sufficient evidence to indicate that he agreed with anyone to thwart the IRS's efforts to determine and collect SPSI's income taxes and/or the personal income taxes of corporate employees and others who received "off the books" income from SPSI.

Before juxtapositioning Meneilly's claim with the trial record, certain preliminary observations are in order. Firstly, although the indictment speaks of the conspirators agreeing to obstruct the IRS in the performance of its tax collecting function with respect to SPSI, the Rodriguezes, *and* other employees and principals of SPSI, if there is sufficient evidence to support the jury's determination of Meneilly's knowing and intentional involvement with the conspiracy's goals regarding SPSI, *or* the Rodriguezes, *or* other employees or principals of SPSI, his conviction under Count One must stand. *See, e.g., United States v. Gomberg,* 715 F.2d 843, 847 (2d Cir. 1983) ("A conspirator need not know all the details of the enterprise, . . . nor join in all its illegal objectives"); *United States v. Murray,* 618 F.2d 892, 898 (2d Cir. 1980). (Tr. at 1710.)

Moreover, "[t]he parties' intent, as well as their agreement, may be inferred from circumstantial evidence concerning the relationship of the parties, their overt acts and the totality of their conduct." *United States v. Furkin,* 119 F.3d 1276, 1279 (7th Cir. 1997) Thus, the mere fact that there is no direct evidence that Meneilly

and one or more of his co-conspirators discussed the effect that their intended conduct would have on the IRS is not fatal to the prosecution's case. The necessary proof of intent may be predicated upon a finding that Meneilly and another conspirator or conspirators had "at least a tacit or mutual understanding that the IRS would not be informed [of the total income received] and the IRS' functions would accordingly be impaired." *United States v. Collins*, 78 F.3d 1021, 1039 (6th Cir. 1996).

And finally, items of evidence should be viewed in conjunction with one another, rather than in isolation, *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989), and the weight to be afforded to the evidence falls within the province of the jury, not the Court in deciding a Rule 29 motion. *United States v. Giraldo*, 80 F.3d 667, 673 (2d Cir. 1996).

With the above principles in mind—as well as *Jones*, 30 F.3d at 281 (*supra* at 17)—attention will now be directed to the trial record. For the reasons previously explained, I will focus on only one of the goals of the conspiracy alleged in Count One, *viz.*, the goal of impeding the IRS in its function of calculating and collecting income taxes from D. Rodriguez and R. Rodriguez.

The observations that follow are not meant to be an exhaustive review of the evidence, nor an outline of the portions of the record which arguably favor the prosecution or the defense. What is intended is a recitation of *some* of the testimony which—if considered in a common sense fashion and together, rather than in isolation—would constitute a reasonable predicate for the jury's conclusion that Meneilly was a knowing and intentional participant in the Count One conspiracy. Among the items of evidence that fall within that category are:

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i. *Meneilly's Managerial Role at-SPSI in General*

A. Meneilly was the owner and President of SPSI. (Tr. at 183.) As such, he was involved in the operations of the business on a continuous basis. (Tr. at, *e.g.*, 185 ("I would discuss any problems that we had, you know, with the company with Mr. Meneilly on a daily basis"); *see also id.* at 756-57 (re Koppelman testimony about new customers).) Meneilly played a central, typically controlling role in major corporate decisions (Tr. at 188), including the decision to join forces with Royal Security (Tr. at 198-99, 203-04, 207, 224-26).

B. All mail, including bank statements for both the "on the books" and "off the books" payroll accounts were delivered to Meneilly (Tr. at 254) who, among other things, "reviewed" the monthly bank statements and the canceled checks (Tr. at 253); if Republic had a question concerning the "off the books" L.M. Management account, Meneilly was the person contacted. (Tr. at 247-48; 731; 1197; 1202-04.)

C. The salaries of SPSI's office staff and supervisors on Long Island were established by Meneilly and Van Cise. (Tr. at 256.) Parenthetically, a number of those individuals—such as Van Cise and Koppelman—were paid via two checks, written against the SPSI "on the books" and the L.M. Management "off the books"

accounts, respectively (Tr. at 252-53; 842), as was one of Meneilly's personal law office secretaries, Phyllis Gavin, (Tr. at 979).

ii. *Circumstantial Evidence of Meneilly's Involvement in Decision to Pay the Rodriguezes "Off the Books"*

With respect to the merger with Royal Security, D. Rodriguez was the co-owner of that outfit with Hector Ocasio. (Tr. at 203.) Van Cise advised Meneilly that D. Rodriguez wanted to be paid "off the books," while R. Rodriguez and other principals of Royal Security wanted to be paid partially "on" and partially "off the books" should SPSI and Royal Security join forces. (Tr. at 225.)

As noted by Meneilly, there is no direct evidence that he accepted that part of the merger proposal. However, there is circumstantial evidence to that effect, including the fact that shortly after Van Cise advised Meneilly of D. Rodriguez's demand (1) Meneilly approved the proposed merger and (2) SPSI's payments to the Rodriguezes and other principals of Royal Security matched the pre-merger demands. That scenario, coupled with the other evidence in the record, certainly permits the inference to be drawn that Meneilly at the very least—by knowing acquiescence—tacitly approved the "off

the books" component of the SPSI/Royal Security merger.

Clearly, there was ample evidence presented to the jury to support a finding that Meneilly approved SPSI paying the Rodriguezes "on" and "off the books."

Granted, Meneilly is not charged with conspiring to pay persons "off the books." (*See* Def. Meneilly's Br. in Supp. at 39 ("[T]he Court is reminded that the charged illegal *objective* of the conspirac[y] in Count[ ] One . . . was *not* the creation of a shell company, or the shuffling of funds . . . [but rather] to defraud the United States" in the computation and collection of taxes) (emphasis in original).)

Meneilly maintains that the record is devoid of evidence indicating that he was a knowing and willful participant in the goal of impeding the IRS in its efforts to calculate and collect income taxes from D. Rodriguez and R. Rodriguez. In so arguing, Meneilly ignores what it means to pay individuals[4] "off the books," as well as the evidence—previously noted—of his ownership of SPSI and active role in the management of the corporation.

It is common knowledge that paying an employee "off the books" denotes: (1) the absence of any reporting by the employer of such payments to the IRS, (2) a failure

[4] The Rodriguezes have been treated as employees of SPSI in the above discussion, in part because the joint operation was conducted under Meneilly's security license for SPSI. However, even if each is considered as an independent contractor, instead of an employee, the analysis in the text regarding the goal of the conspiracy would run along similar lines due to the non-issuance by SPSI of any report to the IRS reflecting income paid to either of the Rodriguezes.

by the employer to withhold for federal income taxes and social security, and (3) the non-issuance of Form W-2s to the employees. And that is precisely what happened here with respect to the "off the books" component of the salaries paid to such individuals as the Rodriguezes. (Tr. at 230.)

SPSI's "off the books" payroll scheme obviously impaired the IRS in endeavoring to ascertain and collect taxes from D. Rodriguez and R. Rodriguez. *Furkin*, 119 F.3d at 1280 ("The absence of records [documenting income from illegal gambling machines.] obviously made it impossible for the IRS to ascertain, compute, assess or collect Allstar's income taxes.").[5]

The jury could reasonably infer that Meneilly—as a lawyer versed in tax matters—understood the effect that SPSI's "off the books" payments to the Rodriguezes, and the associated false W-2s, would have on the IRS. *Collins*, 78 F.3d at 1038 ("As an initial matter, the jury could consider the financial sophistication of those allegedly involved in the tax conspiracy. The jury could easily find that Collins was aware of his income tax obligations.").

The mere fact that Meneilly had no involvement in the preparation of the Rodriguezes individual 1040 returns does not insulate him from responsibility. *Cf. MacKenzie*, 777 F.2d at 820 ("While appellants [the president and general manager of a painting company charged with aiding and abetting the filing of false tax returns] had nothing to do with preparation of the tax returns of the

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[5] It is possible, albeit unlikely, that an employee paid "off the books" would report the income to the IRS. But even if that occurred, the function of the IRS would still be impaired given the absence of a corresponding report from the employer to match against the income declared by the employee.

employees in question [who were paid partially "off the books"], they knew the returns would be fraudulently filed and relied on that fact to conceal their ongoing fraud [*i.e.*, the issuance of false W-2s, the failure to withhold taxes, and to make FICA payments].").

Meneilly is not, as he claims, simply a person in the wrong place at the wrong time, erroneously convicted simply because of his "[s]tatus" and "[p]resence." (Def. Meneilly's Br. in Supp. at 38, 39.) To the contrary, formidable evidence was presented to indicate that he was the chief executive officer of SPSI, and that he knowingly and intentionally "profited," as did the defendants in *MacKenzie*, from the charged wrongdoing. *MacKenzie*, 777 F.2d at 820. As the owner, Meneilly had a significant financial stake in accepting the merger proposal unlike, *e.g.*, Van Cise and Kelly. Royal Security interjected $100,000 of new monies into the operation contemporaneously with the merger, plus the additional customers it provided caused SPSI's revenues to soar. And by paying the Rodriguezes "off the books" with unreported income of SPSI, Meneilly's corporation lessened both its income tax payments and employee-related remittances to the IRS.[6]

Here, as in *United States v. Gurary*, the intent to "[i]mped[e] the IRS . . . was part and parcel of the [underlying] scheme." 860 F.2d 521, 525 (2d Cir. 1988). Although an unintended effect on the IRS—because of lack of knowledge of the tax laws or otherwise—is insufficient to sustain a conviction, an agreement to impede the IRS—even if the understanding is tacit and

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[6] "By underreporting the payroll to the IRS, the corporation avoided significant FICA (social security) taxes for [the] calendar years" involved. *MacKenzie*, 777 F.2d at 813.

only a minor corollary of the overall scheme—will suffice. *Ingram v. United States*, 360 U.S. 672, 675-77 (1959). Indeed, only rarely, if ever, will an intent to impede the IRS drive or define the illegal enterprise contemplated. *See, e.g., Collins*, 78 F.3d at 1038 ("Because of the way the transaction was structured, DLJ undoubtedly understood that Collins was not intending to report this investment as personal income, because to do so would be tantamount to informing the government that he was extorting money.").

The jury readily could have concluded on the evidence presented that Meneilly agreed—tacitly or otherwise—to the goal of impeding the IRS, which goal was "part and parcel" of SPSI's "off the books" arrangement with the Rodriguezes.[7]

In sum, Meneilly's Rule 29(c) motion as to Count One is without merit.

(e) *Membership in Count Two Conspiracy*

Count Two charges Meneilly with having knowingly and intentionally conspired with others to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the IRS in the ascertainment, computation, assessment and collection of his federal income taxes and those of SPSI.

He claims, as he did with respect to Count One, that there was no evidence that he "knowingly joined" or "knowingly participated" in the charged tax conspiracy.

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[7] Given the sufficiency of the evidence as to Meneilly's knowing and intentional participation in the Count One conspiracy, vis-a-vis the Rodriguezes, his involvement with respect to SPSI's income taxes and the income taxes of other employees and guards need not be addressed.

(Def. Meneilly's Br. in Supp. at 38 (Caption of Point III).) That claim is clearly inconsistent with the trial evidence. Meneilly's statement to Petti that his return of a portion of SPSI's income to SPSI represented a "loan" from him to the corporation was not only germane as to Count Twelve, but is also significant for present purposes. Simply put, the jury could have reasonably concluded that Meneilly intentionally mischaracterized the nature of the transaction to Petti so that the Williams-Sonoma monies would not be reflected as corporate income in the SPSI tax return for 1993, which proved to be the case. What Meneilly said (1) furthered one of the goals of the Count Two conspiracy, *viz.*, to defraud the United States by impeding the IRS in the ascertainment and collection of SPSI's income taxes, and (2) is evidence that he was a knowing and willful participant in that conspiracy.

The other goal of the Count Two conspiracy was to obstruct the IRS with respect to Meneilly's personal income taxes. It is undisputed that SPSI paid, *inter alia*, most of the salaries and health benefits of Meneilly's law office staff, the rent for the portion of the suite at 7001 Brush Hollow Road utilized by his law practice, the lease payments for his and his wife's private vehicles, health insurance for his adult sons, as well as the automobile insurance for one of his sons. The payments made for the personal benefit of Meneilly and his wife should have been—but were not—reported on their joint income tax returns. Moreover, SPSI improperly listed many of the expenditures for Meneilly, his wife and children as necessary and ordinary business expenses on its returns.

Of course, if all of the foregoing were done without Meneilly's knowing and willful participation, he could

not properly be labeled a conspirator. In claiming that such was the case, Meneilly maintains that the admitted errors in his returns are chargeable solely to Kelly and that there is an absence of any evidence indicating his involvement in the wrongdoing. Among the items of contrary evidence before the jury were the following:

i. Kelly testified that he prepared Mr. and Mrs. Meneilly's individual 1991 personal tax returns (Gov't's Ex. 4) using "information provided by Mr. Meneilly," including "a computer printout of expenses for his business." (Tr. at 548.)

ii. Kelly took that information and simply entered it in "the tax return where it belonged." (Tr. at 548.)

iii. Included within the 1991 return was a Schedule C, which was based on "some computer generated reports and some handwritten sheets" given to him by Meneilly (Tr. at 549); those materials did not include the benefits that he received from SPSI. (Tr. at 552-53.)

iv. The tax return for 1992 was prepared in the same manner as the one for 1991. "Mr. Meneilly [gave Kelly] the information to prepare the return." (Tr. at 553.) No other books or records were utilized. (Tr. at 553-54.) Kelly's preparation of the Schedule C for 1992 was simplified because "Mr. Meneilly was kind enough to summarize everything on one sheet of paper for me." (Tr. at 554.) Again, the information furnished by Meneilly failed to reflect payments made by SPSI for the benefit of Meneilly. (Tr. at 556-57.)

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v. Upon the completion of the return from 1991, it was given to Meneilly (Tr. at 553); upon the completion of the 1992 return, Kelly either gave it directly to Meneilly "if [he] was there" or "if he wasn't, [Kelly would have left] it on his conference table for him to review."

vi. Kelly indicated on cross-examination that the rent for the law office that was paid by the corporation, together with the salaries paid to Meneilly's law office personnel and other benefits that he received from SPSI, should have been reported as income on Meneilly's Schedule C. (Tr. at 570-73.)[8]

In sum, there was more than adequate evidence before the jury to permit a rational trier of fact to conclude, beyond a reasonable doubt, that the government proved each of the elements of the crime charged, including defendant's knowing and willful participation in the conspiracy charged in Count Two.

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[8] Parenthetically, the government was not required to prove that tax revenues were lost as a result of the charged conspiracy. Thus, Kelly's testimony that recording the income, together with the concomitant expenses, would have resulted in some of the transactions being a "wash" (Tr. at 572-73) did not diminish the force of the government's proof, except that such testimony might have raised a question regarding the willfulness underlying Meneilly's conduct. In that regard, however, the jury heard testimony that a portion of SPSI's income was not recorded in its cash receipt journal and was used to fund "off the books" payments as previously discussed. Accordingly, the jury—if it considered the "wash" testimony vis-a-vis willfulness—might have reasonably concluded that Meneilly elected not to report the income received from SPSI, and the related expenses of operating his law practice, on his Schedule Cs for 1991 and 1992, given the corporate practice of illegally underreporting its income.

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(f) *Other Claims of Meneilly re Counts One and Two.*

In addition to Meneilly's attack on the legal sufficiency of the evidence with respect to his participation in the two conspiracies of which he stands convicted, he also seeks relief as to those counts on four other grounds, *viz.*, that (1) "The Court. Inadequately Responded to the Jury's Question on the Critical Issue of Intent" (Def. Meneilly's Br. at 42); (2) "The Court Erroneously Refused to Give the Requested Charge That L.M. Management was Required to File its own Separate Return" (*id.* at 43); (3) "Mr. Meneilly was Acquitted on Two of the Charged Predicate Acts of the Conspiracies" (*id.* at 44); and (4) the Court failed to give the "good faith and reliance on accountant instructions" discussed earlier with respect to Count Twelve.[9]

The first three additional grounds will be discussed seriatim. For the fourth ground, the prior discussion is incorporated by reference.

i. *Court's Response to Jury Note*

The jury sent a note asking me to clarify the word "tacitly" as used on page 41 of the Charge, and asking if "intent to impede [is] a requirement" under Counts One and Two. (Ct.'s Ex. 10.)

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[9] The *nature* of the relief sought by Meneilly as to these additional grounds is somewhat muddled. Thus, for example, he erroneously identifies the Court's refusal to charge that L.M. Management was required to file a tax return as "[a]nother ground for acquittal on the Count One conspiracy" (Def. Meneilly's Br. in Supp. at 43) rather than as a purported basis for a new trial. Be that as it may, however, I have treated grounds "1," "2," and "4" above as applications for a new trial under Rule 33 of the Federal Rules, and ground "3" as a further argument under Rule 29(c).

The first question was readily answered. As to the second question, the Court said that "the question cannot be answered yes or no." (Tr. at 1774.) This response, Meneilly urges, requires a new trial. For the following reasons, I disagree.

A. The gravamen of the charged offense is an agreement "to defraud the United States" by obstructing the IRS in the performance of its lawful function vis-a-vis the computation and collection of income taxes. *Furkin*, 119 F.3d at 1279 (the "intent" element of a 18 U.S.C. § 371 "Klein" conspiracy is " 'the intent to commit the substantive offense, *i.e.* to defraud the United States' ").[10] *See generally 36 Am. Crim L. Rev.*, "Tax Violations," 1157, 1198 (Summer 1999).

B. The goal of defrauding the United States may be accomplished by the conspirators agreeing to either impede, obstruct, impair, defeat, the IRS in the performance of its duties;

C. In my view, giving the cryptic response of "yes" to the inquiry would have created a risk that the jury would erroneously conclude that the third element of the crime charged was an "intent to impede," not an "intent to defraud."

D. Additionally, the jury's note, in mentioning an "intent to impede," targeted only one of the

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[10] Meneilly refers to *Furkin* in his Brief in Support, stating: "Although not reflected in the transcript, we furnished the Court with *United States v. Furkin*, 119 F.3d 1276, 1279 (7th Cir. 1997), which made clear that 'intent to impede' is required." (Def. Meneilly's Br. in Supp. at 43.) That assertion, however, does not dovetail with the nature of the intent described by the *Furkin* court as quoted above.

> several alternate means—recited in both the indictment (¶¶ 7 and 16) and the Court's Charge (Tr. at 1709)—by which the conspirators may have knowingly and willfully agreed to accomplish their intended goal of defrauding the United States.

It also warrants mentioning that my response to the note was given after a lengthy discussion with counsel. (Tr. at 1757-73.) After being unable to reach any consensus as to an appropriate response, the Court answered as it did, and then asked counsel if any of them wished to approach the bench. All counsel, but for Meneilly's, said "no" with Meneilly's counsel remaining silent. While it is true that Meneilly's counsel opines now—as he did initially during the pre-answer colloquy (Tr. at 1761)—that the appropriate answer was "yes," he also later voiced the following position during that discussion:

> I would respectfully suggest that your Honor read the language in paragraph seven, conspiracy to defraud the United States.

(Tr. at 1761.)

And again, immediately prior to the jury reentering the courtroom, counsel for Meneilly explained:

> I support the approach of referring to paragraph seven which says knowingly and intentionally conspired to defraud the U.S. by the means that your Honor outlined. If that doesn't satisfy the jury, they can pen another note. The indictment is knowingly and intentionally conspired to defraud the U.S.

(Tr. at 1772-73.)

These latter two requests by Meneilly that I read paragraph 7 to the jury is difficult to reconcile with counsel's current insistence that my rejection of his earlier proffered response of "yes" warrants a new trial.

In any event, and for the reasons indicated, this ground for the requested relief is found to be without merit.

ii. *Court's Refusal to Charge That L.M. Management was Required to File its own Separate Return*

Earlier in this decision, I described the activities of L.M. Management. As noted, its *single* function was to use diverted, unreported income of SPSI to fund an "off the books payroll" scheme. I had reservations at the time of the charge conference, as I do now, concerning under what circumstances, if any, it would be appropriate for L.M. Management to report as *its* income, income earned—and unreported—by SPSI. *See generally Pollack v. Commissioner of Internal Revenue*, No. 7174-72, 1982 WL 10931 (Tax Ct. 1982) ("Generally, a corporate entity will not be disregarded for tax purposes so long as it is formed for a substantial business purpose or actually engages in a business activity after its formation. . . . On the other hand, where a corporation is a mere shell and is not shown to have been either formed or conducted for any significant, nontax business purpose, its existence will be disregarded for tax purposes, even though it may be validly incorporated under state law."). Given that circumstance, I declined to give the requested charge. In my view, it was—assuming, *arguendo*, its correctness—unnecessary, and would have been potentially confusing to the jury.

Meneilly posits that this was error because the requested instruction bears on willfulness. However, the Court's charge on willfulness provided a more than adequate framework for the argument in summation that Meneilly lacked the *mens rea* required for conviction to the extent he may have believed that a portion of SPSI's income would be reported in an L.M. Management tax return or returns.

iii. *Acquittal on "Two of The Charged Predicate Acts of the Conspiracy"*

Firstly, the use of the phrase "predicate acts of the conspiracy" is puzzling since Meneilly was not charged in a RICO indictment. Moreover, the point lacks merit for "jury verdicts are not to be reviewed for consistency," *United States v. Jespersen*, 65 F.3d 993, 998 (2d Cir. 1995), and each count must be judged separately in terms of the sufficiency of the evidence. *Id.*

4. *Attack on Verdicts Under Counts Thirteen and Fourteen.*

Counts Thirteen and Fourteen charge Meneilly with having filed false individual tax returns for the years 1991 and 1992, respectively, in violation of Title 26 United States Code Section 7206(1).

The elements of the offense, as explained to the jury are: first, that defendant subscribed and filed a tax return; second, that the return contained a written declaration that it was made under penalty of perjury; third, that defendant did not believe the return to be true and correct as to every material matter; and fourth, that defendant acted willfully. (Tr. at 1725-30.)

Meneilly's attacks on these two counts are: a) "The Court Has Already Found Reasonable Doubt"; b) "Willfulness and Intent Could Not be Established Beyond a Reasonable Doubt"; c) "Due Process"; d) "Reliance on CPA Kelly"; and e) "Sending a Man to Prison for overpaying the IRS Threatens the Integrity of the Criminal Justice System." (Def. Meneilly's Br. in Supp. at 46, 51.)

With respect to argument "a," the term "legitimate dispute" is not, as previously noted, synonymous with "reasonable doubt." It is only when the nature of the "legitimate dispute" rises to the level that a rational trier of fact could not conclude that the government has proven each and every element of the crime charged beyond a reasonable doubt that a judgment of acquittal properly lies. Such is not the case with respect to Counts Thirteen and Fourteen.

With respect to argument "b," Meneilly maintains that:

i. the Court's instructions on willfulness "fall far short of what is required by *[United States v.] Cheek,* [498 U.S. 192 (1991)]," in that it failed to indicate that the " 'known legal duty' requirement is that unlike almost any other crime, ignorance of the law is a complete defense in tax cases" (Def. Meneilly's Br. in Supp. at 47), and

ii. the "known legal duty" here was not Meneilly's obligation to report the benefits received from SPSI as income, but rather to report such items specifically "on line 9" of Form 1040 as " 'constructive dividends.' " *Id.* at 49.

The argument regarding the Court's instruction on willfulness is simply wrong as evidenced by the following excerpt from the charge:

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> For purposes of the counts presently under discussion . . . willfulness has a very specific meaning because tax crimes are different from most other crimes in an important respect.
>
> Ordinarily, a citizen is presumed to know what the law requires of him. However, for tax crimes, ignorance of the law is a complete defense.
>
> Accordingly, willfulness for tax crimes, more particularly the tax crimes charged in the indictment, means the voluntary, intentional violation of a known legal duty.
>
> That means that the Government must prove that the law imposed a duty on defendant, that defendant knew of this duty, and that he voluntarily and intentionally violated that duty.
>
> It is not enough for the government to prove merely that defendant acted with careless disregard or gross negligence, even if others may have been injured by his conduct.

(Tr. at 1729.)

Meneilly's second argument regarding willfulness is also flawed. To maintain, as he does, that the "known legal duty" implicated in Counts Thirteen and Fourteen, was for him "to report certain benefits as 'constructive dividends' on line 9 of his return," poses a myopic position at odds with both the purpose of the "known legal duty" requirement and the nature of the charges returned by the grand jury. (Def. Meneilly's Br. in Supp. at 48.)

The purpose of the requirement in tax cases, as explained by the Second Circuit in *MacKenzie*, is as follows:

> [T]he tax statute standard set forth in *[United States v.] Bishop*, 412 U.S. [346] at 360 . . . (" 'willfully,' in those statutes generally connotes a voluntary, intentional violation of known legal duty"), is designed to separate the purposeful violator from the "well-meaning, but easily confused mass of taxpayers," *id.* at 361, . . . to avoid penalizing " 'innocent errors made despite the exercise of reasonable care.' "

777 F.2d at 818.

Meneilly urges that simply proving that he knew of his obligation to report SPSI-derived benefits as "income" is insufficient to establish this aspect of willfulness. Instead, in his view, that evidence must be supplemented by proof that he knew precisely where on the return the entry should be made for the government to satisfy its burden. Adoption of that position would fundamentally alter the characteristics of the persons sought to be protected by the known legal duty requirement. No longer would the requirement serve to separate the "purposeful violator" from the "well-meaning" but "confused" taxpayer; henceforth, the ambit of protection would also include the "purposeful violator" who intentionally underreports his known income but—because of the lack of an accounting degree or otherwise acquired accounting expertise—is unaware of whether, *e.g.*, he should report the income he received from a corporation of which he is a shareholder on line 9 of Form 1040 as "dividends," or on line 21 as "other income."[11]

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[11] Meneilly's reference to *United States v. Borman*, 992 F.2d 124 (7th Cir. 1993) and *United States v. Reynolds*, 919 F.2d 435 (7th Cir. 1990), as authority for the proposition that "Counts 13 and 14 must be dismissed for failing to state prosecutable offenses," is not

Contrary to the position advanced by Meneilly, the "legal duty *at issue*" here concerns Meneilly's awareness—or lack thereof—of his obligation to report the income received from SPSI on his Form 1040s for the years 1991 and 1992. (Def. Meneilly's Br. in Supp. at 47 (emphasis in original).)

United States v. Evangelistas, 112 F.2d 112, 118 (2d Cir. 1997), and *United States v. Wallace*, 40 F. Supp. 2d 131 (E.D.N.Y 1999)—identified by Meneilly as "[t]wo recent interpretations of *Cheek* in this Circuit" which supposedly support his position (Def. Meneilly's Br. in Supp. at 47-49)—are inapposite.

Evangelistas was convicted of several tax crimes, including being a member of a Klein conspiracy. Among his unsuccessful arguments on appeal was the claim that the district court erred in refusing to give his "reli[ance] on the advice of . . . accountant" request to charge. *Evangelistas*, 112 F.2d at 116. on page 118 of *Evangelistas*—which is the page cited by Meneilly—the Circuit, after discussing the "subjective belief" aspect of the Supreme Court's decision in *Cheek*, concluded that Evangelistas' invocation of that case in support of his position was "misplaced." Absent from *Evangelistas* is any language, much less a holding, which supports

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persuasive. (Def. Meneilly's Br. in Supp. at 50-51.) In each of those cases, the taxpayer used an IRS form which lacked a line to list the unreported income which served as the basis of the prosecution under 26 U.S.C. § 7206(1). Accordingly, the forms, as filed by Borman and Reynolds, were literally correct. The Seventh Circuit held in both cases that the mere filing of the wrong form, even if intentional, does not violate § 7206(1). Here, however, the Form 1040 used by Meneilly had lines to report the income he received from SPSI, including one labeled "other income." Under the circumstances, the concept of "literal truth"—which is central to the holdings of *Borman* and *Reynolds*—is irrelevant for present purposes.

Meneilly's argument as to the nature of the known legal duty involved in Counts Thirteen and Fourteen.

Wallace similarly is of no aid to Meneilly. There, the defendant testified that it was his belief that under "IRS regulations . . . his wages [were] non-income for federal tax purposes." *Id.* at 132. Based on that belief, he filed a tax return for the calendar year 1995 seeking a refund of the federal taxes he had paid during the prior three years, as well as the return of the monies withheld for taxes during 1995. He was indicted for allegedly making false statements in his application for tax refunds, in violation of 18 U.S.C. § 287.

In ruling on certain charge requests,[12] Judge Weinstein explained:

> The gravamen of the charge in the instant case is one of tax law violations. The falsehoods charged depend upon an understanding of legal definitions of such terms as "income" and "citizenship" under the tax code and regulations. *If defendant believed in the definition of these and other terms suggested by his coworker, he would not be lying when he claimed entitlement to full refunds.* . . . The government must prove beyond a reasonable doubt that defendant knew his view of his responsibilities under the tax law was wrong.

40 F. Supp. 2d at 135 (emphasis added).)

The definitions of "income," "citizenship," and the other terms upon which Wallace's refund claims were specifically predicated obviously were a necessary part

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[12] The two charge requests, both granted, were: (1) the government's conscious avoidance charge, (*id.* at 135), and (2) "[d]efendant's request for an appropriate instruction [embodying] the conclusions of Cheek on mistake of law," (*id.*).

of the charge. Here, however, there is *no* evidence to suggest what Meneilly believed—reasonably or otherwise—as to the reportability for tax purposes of the benefits he received from SPSI. Accordingly, the government was not required, in the language of *Wallace*, "to prove beyond a reasonable doubt that defendant knew his view of his responsibilities under the tax law was wrong, nor was the court required to fashion an instruction addressed to a non-existent dispute as to the meaning of various terms.

In sum, *Wallace* does not support Meneilly's claim that the known legal duty at issue must be defined via reference to the concept of constructive dividends and line 9 of Form 1040.

Meneilly's "constructive dividend" argument is also flawed for it ignores the fact that the perjurious statement identified in Counts Thirteen and Fourteen is that he failed to report the "substantial income [he received] from SPSI" on his Form 1040s for the calendar years 1991 and 1992, respectively. He was *not* charged with intentionally failing to report those benefits as constructive dividends.

Given Meneilly's background as a lawyer, and as tax preparer for various clients and for SPSI prior to Kelly coming on board, the jury had more than sufficient evidence to conclude that Meneilly was aware that the multiple financial benefits that he received from SPSI were reportable—either as "dividends" or as "other income"—on his Form 1040 returns.

And finally, Meneilly's arguments on willfulness are not a model of clarity. But to the extent it may be claimed that the government somehow transformed the charges in Counts Thirteen and Fourteen from the intentional underreporting of income to a failure to list such

income as dividends on line 9 of the Form 1040 returns, the record indicates otherwise.

Although there was testimony by IRS Agent Doreen Centeri that the appropriate place to report some of the income was on line 9 as dividend income, (Tr. at, *e.g.*, 1163, 1168 and 1169),[13] neither her testimony nor the arguments of the prosecutor served to transmute the nature of the charges returned by the grand jury. By way of example, the government in its opening statement said:

> With regards to the counts that charge false statements on the individual returns of . . . Mr. Meneilly, these charges are based upon the defendant['s] failure to report some or all of [his] income from [SPSI] to the IRS.

(Tr. at 58.)

The prosecutor during summation indicated that the monies should have been reported as constructive dividends, but she did not limit her argument to that position. Rather, she told the jury:

> None of this money was reported anywhere on his return, making the return false as to the material matter, the true amount of his income for each of those years.

(Tr. at 1504.)

In sum, the "known legal duty" implicated by Counts Thirteen and Fourteen pertains to Meneilly's obligation to report as income on his 1040 returns the income he received from SPSI during the subject years. His argu-

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[13] Agent Centeri also testified that, in her view, some of the other benefits received by Meneilly should have been listed on line 22 of Form 1040 as "other income." (Tr. at 1177.)

ment to the contrary is off target, and the jury's verdict as to each count is not subject to vacatur under Rule 29(c).

The first of Meneilly's other arguments as to Counts Thirteen and Fourteen, argument "(a)", *viz.*, "legitimate dispute" signifies "reasonable doubt," has already been discussed.

Argument "(c)," *i.e.*, the due process claim, is patently without merit.

Argument "(d)," concerning the "good faith reliance on Kelly" request to charge, was addressed previously.

And finally, argument "(e)"—*i.e.*, "Sending a Man to Prison for Overpaying The IRS Threatens the Integrity of The Criminal Justice System"—mischaracterizes the nature of the charges of which Meneilly stands convicted.

Appendix B

DAVID RODRIGUEZ'S MOTIONS

The first of D. Rodriguez's two motions seeks a judgment of acquittal, pursuant to Rule 29(c), upon the claimed insufficiency of the evidence with respect to the counts of conviction, those being Counts One and Four. That application is denied. There was ample evidence for the jury to conclude that each element of each of the two crimes was proven beyond a reasonable doubt. In that regard, the Court's bench decision of May 3, 1999 is hereby incorporated by reference.

D. Rodriguez has also moved for a new trial with respect to Count One, pursuant to Rule 33. In doing so, reference is made to a conversation movant's counsel had with juror number six shortly after the jury was discharged. During that conversation, the juror is reported to have said that she "surrendered her conscientious conviction that Mr. David Rodriguez should have been acquitted of Count One" and that she was "in effect coerced" into acquiescing in the decision of the other jurors regarding that Count. *(See* May 17, 1999 Letter of Murray Richman, Esq. at 2.)

The jury was polled after the foreperson reported the verdict. Juror number six answered "yes" to the question "is that your verdict," as did the other eleven jurors when asked the same question. Nonetheless, Mr. Richman proffers:

> At the time the verdict was taken juror number six exhibited tremendous difficulty and strain during the polling period. She made faces, she repeatedly hesitated, she covered her face, she acquiesced as to the verdict for Count Number One as to David Rodriguez.

(*Id.* at 1.)

I did not observe any hesitancy by juror number six during the polling process. But even if defense counsel observed some type of hesitancy which was not apparent to me which preceded or accompanied her answer of "yes," the current application is out of sync with the following colloquy that occurred after the jury was polled and before it was discharged:

> THE COURT: . . . . If counsel could approach for a moment. (Sidebar.)
>
> THE COURT: It would seem to me the jury should be discharged. Is there any reason the jury should not be discharged?
>
> MR. RICHMAN: No, your Honor.

(Tr. at 1800.)

And later, after the jury was discharged, but before the previously-noted conversation between counsel and the juror, each attorney was asked by me if anything further should be done before we recessed. To that inquiry, Mr. Richman answered, "Nothing, your Honor." (Tr. at 1805.)

In sum, to the extent that the suggestion is made that the Court should not have accepted the verdict, D. Rodriguez's position is inconsistent with my observations at the time the verdict was taken and, more importantly, with counsel's statements to the Court (1) immediately after the jury was polled and (2) after the jury was discharged but before his conversation with juror number six. Under the circumstances, any claim that the jury should not have been discharged has been waived.

To the extent D. Rodriguez seeks a new trial as to Count One not on the basis that the jury was improperly

discharged, but due to the interaction amongst the jurors during the deliberative process, that application runs afoul of the proscription set forth in Rule 606(b) of the Federal Rules of Evidence. *See also Tanner v. United States*, 483 U.S. 107 (1987).

For the reasons indicated, the motions by David Rodriguez for a judgment of acquittal as to Counts One and Four, and for a new trial as to Count One, are denied.

RICHARD RODRIGUEZ'S MOTIONS

R. Rodriguez seeks a judgment of acquittal, pursuant to Rule 29(c), on two grounds. Firstly, he cites a perceived inconsistently in the verdict concerning the count of conviction and his acquittal under Count Five. However, as noted earlier, each count must be considered separately in determining a Rule 29 motion, and an inconsistency in the jury's verdict is not a ground to vacate a conviction.

As to R. Rodriguez's sufficiency of the evidence attack on Count Six, there was more than adequate evidence to support the jury's verdict. *(See* partial synopsis of evidence re Count Six set forth in Gov't's Letter of May 20, 1999; *see also* Court's bench decision of May 3, 1999.)

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CONCLUSION

For the reasons indicated, the defendants' motions are denied *in toto*.

SO ORDERED.

Dated: Hauppauge, New York
December 21, 1999

DENIS R. HURLEY
DENIS R. HURLEY, U.S.D.J.

APPENDIX C — TRANSCRIPT EXCERPT FROM SENTENCING CONTAINING THE DISTRICT COURT'S FINDINGS OF FACT RELATING TO TAX LOSS, DATED SEPTEMBER 6, 2000

THE COURT: . . .

[66] to file tax returns and get back anything that they're entitled to. So even if we take their figure as the figure that was lost because LMS failed to withhold, in the first instance, the income taxes of the employees, that figure is $1,022,056.

Now, there's no dispute that the corporation was obliged to withhold FICA, pay over FICA and pay FUTA taxes. That comes to a total of 21.5 percent of the gross income of the corporation which, we're assuming for the purpose of this exercise, was paid out in salaries. We take 21 percent of the $8.9 million as the FUTA, FICA taxes. We come up with a tax loss of $1,919,019.

When you combine those two figures, the loss lost income based on the employees, based on the lost income taxes, and you combine it with the lost FUTA taxes, we come up with a tax loss figure of $2,941,075.

And as we ascertained at the last hearing in the case or one of the last hearings in the case of Mr. Meneilly, we add an additional $76,223 to that figure because of the tax loss on the Williams Sonoma money that went into his attorney trust account. So the tax loss figure for Mr. Meneilly comes out to $3,017,298.

I think using the presumptive rate—we came out at a lower tax loss figure using the presumptive rate, the 34 percent, for the corporation.

[67] So having said that, I still rest on our presentation but point out that the tax loss figure is even greater if we accept the hypothecations of Mr. Levy; and in that case,

under the guidelines, the offense level, it actually comes out to the same offense level, which is a 21 under either calculation.

THE COURT: Let me ask you a question concerning the presumptive rate. I should look at what 2T1.1C2—I think it's page 240 of that volume.

MS. NORDENBROOK: Yes, your Honor, that is our position.

THE COURT: Let me ask you this. I have already ruled, over the objection of the Government, on the tax loss produced by SPSI's failure to report as income the money that was placed in the LMM account and used to fund the off-the-books payroll situation.

Now we're considering alternate methods of determining loss. Part of that process involves figuring out how the presumptive rates, if in fact they're applicable, are implicated.

Now, it would seem to me, and obviously I'm not sure of this so I want counsel's input, to hold Mr. Meneilly responsible for the taxes not paid by the off-the-books guards, I obviously look to IB13 under relevant conduct, and there's also another section which [68] has been cited. I'll withdraw that. It's also application note 2T1.1 is instructive for present purposes.

In any event, what did the employee supposedly do that Mr. Meneilly would be held accountable for under 1B1.3 for sentencing purposes? What the employees failed to do was to file a tax return. What I'm saying is, I'm not so sure that the applicable rate is set forth in note two, not in note one. Forget FICA and that's another matter.

MS. NORDENBROOK: First of all, your Honor, let me say this.

I don't believe the Court—I think that in our submission of June 1st, and perhaps I didn't make it clear, the Government realized that, in fact, the onus is not on the employees to, in the first instance, to pay the taxes. Under Title 26, Section 3402, the employer is obliged to withhold and pay, and then the purpose of a tax return is for an employee to either pay additional taxes if the employer hasn't withheld enough to cover his or her tax liability or to get a refund.

THE COURT: You did address that and that's under the withholding theory. I thought we were talking about the recipient theory.

MS. NORDENBROOK: But I don't think the **[69]** recipient theory is—I don't think it's defensible given the structure of the tax loss because the loss is a result of the employer's failure to withhold and pay, so it isn't a question of and he or she doesn't.

THE COURT: I have no problem. These are alternate theories, withholding the recipient, but you used the term "presumptive rate" and it's been referred to by Mr. Ryan, as well.

If you're talking about the withholding theory, the percentages are what they are. There is no presumptive rate. Note A has to do with a situation where there's an underreporting of gross income by a corporation or an individual. So a presumptive rate is irrelevant. It is relevant to the recipient theory.

MS. NORDENBROOK: I think the Court is right. If one approaches it in that way, then it is a 20 percent presumptive rate. I think that's correct. That's with regard to the employee's income taxes, the unpaid employee income taxes.

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If one put the onus or views it as a function of a failure by the employees to do something, if one views it in that way, then I think the Court is correct, that it's 20 percent in terms of the income tax loss as a result of the unpaid income taxes, as opposed to those taxes for which—those other taxes for which the [70] employer is directly responsible.

THE COURT: All right. Let me go through this.

Firstly, I'll make findings of fact and conclusions of law with respect to the hearing.

Mr. Levy was called by the defense, and he provided his background and he indicated what he did, and his testimony pertains to what Mr. Ryan has identified as the recipient theory. The recipient theory is or pertains to the income taxes that was required to be paid and was not paid by the employees for off-the-book employees of SPSI.

Now, on the prior occasion, and that's one of the problems when things are so truncated, we had discussed, I believe, the reason that I think it's a permissible presumption for present purposes to conclude that to the extent individuals were paid off-the-books through the LMM account at the Republic National Bank, that the payees did not report the income as income tax received. I think I have gone through that process. I'm not sure. I think it's worthwhile to address it because of my uncertainty in that regard.

Firstly, the purpose of the off-the-books payroll scheme is obviously to avoid, and this is consistent with the trial testimony, the requirements of paying FICA, providing withholding statements, and so forth. As a [71] matter of fact, Mr. Van Cise said basically it would be very difficult to compete in this guard business if you

were required to make these payments. He also indicated that a number of the guards, such as off-duty police officers, basically insisted that they be paid off-the-books. Obviously, I'm not saying all of them, but the testimony was a large number did.

Firstly, the purpose of the program is basically to avoid paying the taxes that are due to the IRS. Moreover, we do know that a number of individuals who did receive off-the-books payments as part or all of their compensation did not report this income or did not fully report it. That's true of the Van Cise's; it's true of Linda Koppelmann; it's true of some of the individuals who worked with Mr. Meneilly who were paid off-the-books in part; it's true of the defendants.

Also, since no W2 was issued to an employee, it would be very difficult for that individual to report the income because to report the income, you're required to attach the earnings statement from the employer. If an employee had done that, in fact, it would jeopardize the entire plan, at least arguably.

The point is, and the materials that have been submitted by counsel are also germane on this issue, as to what is in issue and what is not, clearly supports the [72] proposition that, in fact, the individuals who received the monies from the LMM account did not report those sums to the IRS as income.

We're going to address Mr. Levy's testimony. As I indicated, I found him to be a credentialed individual for the purposes for which he was called. He indicated that he had reviewed certain items, and his purpose was to determine whether there was a more accurate way to determine the actual loss attributable to the employee not paying income tax than applying the presumptive rate. The presumptive rate is 20 percent.

Towards that end, he reviewed the testimony of certain witnesses. He reviewed LMM bank records, which consistent of bank statements which would list all of the checks that were issued, and he also reviewed some of the checks that were available. The actual checks that were available, apparently, are about 25 percent or less of the total checks issued.

He also reviewed certain Government records that were in evidence and that were provided to him. And he indicated the purpose of that was it would sort of show you in general terms—and I think "sort of show you in, general terms" is essentially what he said—concerning the extent and nature of the off-the-books payroll scheme and the resulting tax loss to the Government.

[73] He indicated one of the problems here is that there are no Social Security numbers that are attached to any of the records, such as the production sheets, which pertain to the off-the-books payroll scheme. So he used the example, I think it was Jose Lopez, he said, I may find the same name on the on-the-books payroll records of SPSI and on the production sheets, but whether they're the same individual cannot be determined.

He indicated the procedure he followed in trying to determine the average income that was received by the typical off-the-books payroll guard, and the purpose of that was to see whether the resulting estimated tax due from such a guard would be less than 28 percent.

The assumption that he made was that for every check that was issued from the LMM account, that check was used or was a payroll check. He recognized that that wasn't true. He recognized that some of the checks were used for other purposes. This interjects a certain amount of uncertainty and it is essentially as follows:

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To the extent that checks were used for another purpose, a problem develops in dividing what you believe to be the number of guards into the total checks or the amount of the total checks issued to determine the average amount. Now, it is true that this really works both ways.

[74] To the extent there's a problem determining the average check when there's uncertainty whether all of the checks were issued for payroll, it's also true that to the extent checks were issued for non-payroll purposes, that the number of guards that is being divided into the total amount of the checks issued is similarly flawed. In other words, the number of guards should be lower. So you have two variables, both of which is somewhat uncertain.

One of the problems that developed with the methodology or an additional problem that developed with the methodology employed by Mr. Levy—and the problem is not so much with his analysis—the problem emanates from the nature of the records that are available and the fact, among other things, that there are no Social Security numbers for any of the off-the-book payroll individuals.

In any event, we do know that some of the off-the-books—withdrawn.

We do know that some of the checks that were issued from the LMM account were paid to individuals who were partially paid on-the-books. I think, and I don't recall because the trial was so long ago, I think there's evidence that one of the Rodriguez, wants to be partially on, partially off; and the other wants to be paid totally off-the-books. That's an example. There are different ways to do this.

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[75] We also know from the trial evidence that some of the LMM off-the-books payments were to compensate people for overtime, and there was reference to police officers that would fall into that category. Why is that a problem? Well, to the extent that a person would be paid on-the-books, the person's total income would be higher than estimated by Mr. Levy. To the extent his or her income was higher, the applicable rate would be higher.

Also, there's no way to determine whether some of these individuals had other employment. We don't know if they worked for another guard outfit. We don't know if their spouse, for instance, worked. As Mr. Richman has indicated, and I think it's a fair statement, many of these people, apparently, were certainly not wealthy individuals. They were economically marginal people. That doesn't suggest, however, that the spouse wasn't working somewhere. It doesn't suggest that they might have had another job. That's a problem. We don't know that and there's no way to determine it.

There is evidence that Mr. Levy did compare the ADP payroll form generated by an on-the-books payroll operation with the documentation that exists as to the off-the-books payroll scheme funded through LMM's account at Republic. I think he indicated that in the list provided by the Government, which is not necessarily [76] exhaustive, that there were about 200 people and that in looking through the LMM material, he saw about 28 names that were similar; but again, there was no way to determine, as he indicated, whether they were, in fact, the same individuals. That's significant, again, because you can't go into what these individuals earned.

So in essence what I'm saying is, that I don't think a better method has been presented which reflects the tax loss to the Government under the so-called recipient the-

ory. I think that the tax rate mentioned a moment ago for which Mr. Meneilly would be held responsible under this theory is 20 percent, and I think that is what should be applied because I think it's the best that we can do under the circumstances.

There's an alternate approach here; and in that regard, let me say this, and I think I said it before, but I want to make it clear on the record. I think there is a case which indicates, as I indicated earlier, that maybe under certain circumstances the answer comes forward with the—I'm rejecting that approach.

In making this determination, I have placed the burden of proof on the Government. Therefore, I'm not saying that Mr. Meneilly did not prove that there was an alternate method. What I have said is, based on the totality of the circumstances in placing the onus on the [77] Government, it appears that the appropriate rate here is 20 percent.

We also have this other situation, and this has to do with monies that an employer is required to pay to the IRS. I'm going to go through this, and then we will step back. We will approach this other approach, the so-called withholding approach, disjunctively.

The law provides that, firstly, an employer is required to make withholding payments which will be applied towards income tax due by employees. That's an onus that's placed upon the employer. In addition to that, there is a tax which is the Federal Insurance Contribution Act tax, commonly known as FICA. I think there are two components to that. One is Social Security and the other has to do with Medicare or whatever.

The sum total is 7.65 percent, which the employer is required to remit on behalf of the employee. And that sum—and it's up to a certain amount, however, which

varies. It's up to—now it's up to somewhere around $76,000 in wages. I have a chart here which goes back over the years in question.

The maximum salaries subject to FICA in 1990 was 51,300. In 1991, it changed and it gets somewhat complicated. 6.2 is payable up to 53,400, and the 1.45 goes up to 125, and it continues through the years and **[78]** generally escalates through the years.

The reason that's relevant is that if you apply the 7.65 to the total payroll, you could, depending on the underlying circumstances, have a figure which overrepresents the amount of loss to the Government. That would be particularly true where you have high-income individuals. We don't have that here.

The rate is set forth in the rate of pay for the average guard, and we're talking about these defendants who received considerably more than that. We're talking about the average payroll guard. The amount he received or she received is in the minimum-wage category. Mr. Richman indicated it was under $5. I think it's $4.65. It's in the report. That seems to dovetail with the argument of Mr. Richman.

The point is here because very few of these individuals would have received a salary in excess, for instance, in 1990, $51,300, that would mean that the total FICA amount that the employer was required to remit to the IRS on behalf of the employee would probably be 7.65 uncapped. Now, in addition to that 7.65—and also for the employee, it's not deductible. The employer doesn't even get a deduction for that. There's no offset for the employee. That's a tax they pay. Now, with respect to the employer, the employer is also required to pay 7.65 **[79]** percent to the IRS, That's a tax. That, I believe, is deductible.

Prescinding from that, we go to another area and that has to do with the Federal Employment Tax Act. That places a burden on an employer; and for every employee, the employer is required to remit 6.2 percent of the income paid to that individual. That has a ceiling. I think it's around $7,000.

Now, here, the evidence indicates that the required withholding payments were not made, the FICA was not paid, the FUTA was not paid. Now, it would seem to me that, firstly, there's a problem if you use both the recipient theory and the withholding theory. But it's very complicated because what would happen is, with respect to the withholding, the employee would get a benefit for that against his income. Of course, they didn't report the income but that's the case.

So if you use the retention theory with a 20 percent presumptive rate and you fully, basically, hit Mr. Meneilly, under 1B1.3, for the withholding not made by SPSI, you do run the risk of him being saddled with an unduly high tax loss. So it's really a question of what is the better way to do this.

The cleaner way probably is to do the withholding theory. I think there is a rate that is supposed to be **[80]** withheld. I know there's a chart and the lowest, I think, is 15 percent. I looked at that chart. You're supposed to take 15 percent for anybody that earns over $500 or something, which they could withhold for the employee.

Now, the question is, what should be done at this point? Firstly, let me get input from counsel. Maybe I don't need input. Bear with me. I have the information. I haven't looked at it recently. This has to do with the question of withholding. I believe I'm correct on that.

What all that means is basically you take—probably the best way is to take the total, the FICA, which is 15.3 percent. You would not factor in the FUTA.

Why? Well, just basically to give the benefit of the doubt to the defendant. FUTA is 6.2 up to 7,000. We do know that FICA caps at a certain figure back in 1990, 51,000 plus. So to avoid any possibility of an elevated loss, you factor FICA out of the process so—excuse me FUTA. So you would have the FICA, FUTA you would not factor in, and you would have withholding.

If you did that, you would end up with a rate of slightly over 30 percent and what would that be applied against? That would be applied against the LMM payroll, off-the-books payroll for the years in question.

Now, you would deduct from that the amounts received by each defendant to avoid double counting from **[81]** the off-the-books payroll, and you would find that it was fully foreseeable by Mr. Meneilly that these taxes would not be paid; and in fact, they weren't paid. That's undisputed. That produces basically a 30 percent rate.

Now, also what I would like to do is determine what that number comes out to because these brackets are quite broad under 2T1.4, so some of this may be academic. There's also the question of monies he didn't report on his income tax to the extent—the income he did not report on his income taxes, to the extent it produced a loss in tax revenue, would have to be factored in. There's other issues that have been raised which I'm not so sure need to be further pursued, Williams Sonoma and so forth.

What I'm going to do is, I'm going to use that rate, that 30 percent. This doesn't have to be done with mathematical precision for present purposes. To the extent

there's uncertainty, it should enure to the benefit of the defendant.

I think I have done that because another way to do this, quite simply, would be if you take the FICA, the FUTA adjusted, forget about the withholding, and then apply the 20 percent rate, that would be over—and that would be entirely appropriate—that would get you over the 30 by quite a bit. That's basically where we are. **[82]** That's going to be my decision in that regard.

Then we have to decide what the 30 percent should be applied against. I think maybe what we ought to do is the Court Reporter has been here since 10:30. It's now a quarter of one. I think what we ought to do is take the luncheon recess. We will take an hour. When we come back we will go over these calculations that we have and then go through the probation report and see where we are on that.

We still have the application for a downward departure. The methodology that's been applied is equally applicable to the Rodriguez brothers. The numbers are different because, among other things, it was only foreseeable for them to understand the loss to the Government vis-a-vis the Bronx guards. So that adjustment has to be made, but the percentage is the same.

We will break for an hour and then finish this up, and we will be done today. Thank you everyone and we will stand in recess for an hour.

(Lunch recess taken.)

[83] AFTERNOON SESSION

THE COURT: At this point, we will pick up where we were.

The question is, what is the amount of the tax loss? And looking at the submission of the Government, Mr.

Appendix C

Ryan's submission, including the May 18th, 2000 letter, and the presentence report, more particularly paragraph 21, the amount of the income that was funneled to the LMM account to fund the off-the-books payroll scheme was $8,925,672.

If 30 percent, consistent with what was said prior to the recess, is applied to that number, the resulting figure is $2,677,701.60. If the amount of the tax loss attributable to Mr. Meneilly is factored into that or added to that number, using the appropriate rate, the sum total of those two is 2,700,000 plus.

Now, typically a defendant such as Mr. Meneilly would be responsible for, under 1B1.3, the tax loss realized by—tax loss to the Government attributable to the nonpayment of taxes by the codefendants. Here, however, looking at the tax table, to wit, 2T4.1, the sum of 2,700,000 plus falls between P and Q. It is more than 2,500,000 and it is less than 5,000,000. So that means that the offense level attributable to that is a 21.

Now, one thing I will mention quickly—I think, [84] again, we touched base on this but I'm not sure—has to do with the appropriate book. There was a change in the tax table.

If you look at the '92 book—and by that I mean the book which incorporates guidelines amendments through to November 1st of 1992, a lose of this magnitude with I think the one level less, however once you get to the November 1st, 1993, guideline, that being 2T4.1, the tax table is exactly the same as it is today.

Now, here, I do note that the two conspiracy counts of conviction have ending dates which postdate November 1st of 1993. One is in December of '93 and the other is, I believe, in '94. The point is that the appropriate table

here is the one that was in effect. It's the same, it's 2T4.1 as it now reads. It is a 21.

MR. BURNS: I believe you're addressing Mr. Meneilly. In the Richard Rodriguez report, they give him the benefit of the '92 book.

THE COURT: In his case, he was not found guilty of the conspiracy and the counts of conviction. I'm aware of that. Your situation is different.

MR. BURNS: Thank you.

THE COURT: That's basically where we are.

Before we discuss the question of a downward departure, we ought to have a reference point. The total **[85]** offense level is a 25, and the criminal history category is a I, and that would call for a range of incarceration between 57 to 71 months.

As far as the reference point, not how we got there, is that agreed that's where we are?

MS. NORDENBROOK: The 21, plus the 4 points for leadership role?

THE COURT: Yes.

MS. NORDENBROOK: Yes, your Honor.

THE COURT: That corresponds to the 57 to 71 months.

Mr. Ryan, are we agreed that's where we are, not how we got there, but that's where we are?

MR. RYAN: That's where we are without hearing anything about reasonable foreseeability.

THE COURT: I would be happy to hear about reasonable foreseeability, absolutely.

MR. RYAN: I would like to know what would your Honor like me to address at this point? Reasonable foreseeability. I didn't realized that was—that that problem hadn't been resolved. I thought it was addressed previously. Apparently, it had not been and that's obviously very pivotal.

MS. NORDENBROOK: Your Honor, I thought it was.

MR. RYAN: I'm aware in the Rodriguez presentence [86] reports the reasonable foreseeability that they're accountable for is not the entire tax loss. It's only that amount of the loss in which they were involved in the conspiracy, the Bronx operation, and to the extent there was unreported income arising out of the Bronx operation where they were involved in that operation.

They're not held accountable for unreported income by guards employed by SPSI that worked on Long Island, as an example.

The reasonable foreseeability argument has been applied in the Rodriguez case, but I haven't seen it applied in Mr. Meneilly's case. We have been assuming, solely by reason of the verdict on the conspiracy count, that Mr. Meneilly had a tacit understanding with the Rodriguezes and Van Cises to create this off-the-books account. But where is the evidence in the record that indicates to what extent did Mr. Meneilly have reasonable foreseeability that it would add up to this staggering sum of $8.9 million?

We take the L.M. Management account. He wasn't involved in the operation of the checks. He didn't sign one check, didn't receive one dime. Take the L.M. Management Corporation. He was not a director, shareholder. There was no witness that testified that he was involved

in the management, control of the [87] L.M. Management off-the-book operation, zero.

In fact, Mr. Kelly's testimony on cross-examination was that he too, Mr. Kelly, was unaware of the amount that he wanted to prepare corporate tax returns from L.M. Management. He asked for summaries of the amounts paid to the employees from that account; and he never got it while he was on board and in the office, as opposed to Mr. Meneilly who would, on occasion, stop by but was undisputedly spending a major part of his time as president and chairman of the board and counsel for Massapequa General Hospital during this period of time.

So I do believe, Judge, that to hold Mr. Meneilly responsible for the $8.9 million would be erroneous in the absence of a foundation in the record to indicate that he was aware of the amount that was passed through this account and would generate such a tax loss. He simply isn't.

There's a conviction, a count, Count One, that he had a tacit understanding to defeat the IRS's ability to collect and compute the tax. When it comes down to determining to what extent he was aware of that, the record is barren.

We are aware, of course, from the decisions that it's not enough to rely on the conspiracy count verdict, that the Court is obligated to determine to what extent he [88] is a conspirator and was aware of the amount of the tax loss.

And I respectfully submit, in the absence of any evidence that he was aware of the extent of the tax loss, he should not be held accountable for the tax loss as found by the Court.

THE COURT: The predicate for that determination, and I agree with you, the mere fact that the jury found he was a coconspirator does not necessarily mean—and in fact, does not mean, in and of itself, that he can be held responsible under 1B1.3. The standards are different, et cetera.

My question is, in making my determination, do I have everything before me?

MR. RYAN: Yes.

THE COURT: I would look at the trial record. I would obviously listen very carefully to the argument of counsel and so forth.

MR. RYAN: No one knows this record better than your Honor, and you have it all.

THE COURT: That's the evidence, the trial record?

MR. RYAN: That's correct.

THE COURT: That's fair enough.
Do you want to be heard, Ms. Nordenbrook?

[89] MS. NORDENBROOK: Well, I would call the Court's attention to the testimony of Inga Anderson on April 29th, beginning at page 1197.

"QUESTION: What, if any, discussions with Mr. Meneilly did you have about this account at the time it was opened?

"ANSWER: At the time it was opened, Mr. Meneilly told me that if there was any problem that he was opening this account, a corporate account, and if there was any problem, I should call his office; and if he wasn't there, I should speak to Phyllis."

She further, at 1202, testified that if there were any problems, either she or Mr. Ramos would call Mr. Meneilly.

I think that's dispositive. This account was opened to fund the off-the-book payroll account. Mr. Meneilly was the one who opened it and controlled it, at least in the opinion of the bank, and he doesn't have to realize that in the course of the years that follow that there's going to be $8,925,000 that went through it.

All you need to be reasonably foreseeable is that money is going to go through it that's not going to be reported to the Government. And I think the record is overwhelming, but I think that Ms. Anderson's testimony is sort of the piece to resistance in terms of that evidence, [90] evidence from an outsider. It's corroborated by the testimony of the insiders, and I think it meets the requirements of foreseeability.

THE COURT: I think the circumstances surrounding the opening of the LMM account and Mr. Meneilly's knowledge of certain individuals associated with the account, I don't think that's dispositive. I think it's part of the evidence. It has to be viewed in conjunction with all of the evidence.

And as has been indicated, the mere fact that Mr. Meneilly has been found guilty of Counts One and Two and certain other counts of the indictment, does not indicate that the relevant conduct presently under discussion should be attributable to him. In other words, the standards to determine liability when charged with a crime are not the same as the standards that are employed vis-a-vis the issue of relevant conduct.

Moreover, I'm required to make this decision, not the jury. It is my role to decide whether, in fact, the Gov-

ernment has established that this relevant conduct determination is appropriate in this case. The record here is quite voluminous; and firstly, I did write a fairly detailed post-verdict decision concerning an application made by the defense for a judgment as a matter of law.

[91] Now, again, the standards are not the same. However, there are factual findings that are set forth and conclusions that are set forth in that decision which bears on this issue. I do find that Mr. Meneilly did occupy, as noted previously, a leadership role with respect to this conspiracy, that he was a pivotal person in the process and that the conduct of the other individuals was reasonably foreseeable by him under 1B1.3.

There has been mention of the amount of money involved. Technically, that is not, it would seem to me, the dispositive reference point. Rather the guidelines speak of the reasonably foreseeable acts and omissions of others taken in furtherance of the jointly undertaken criminal activity. If the acts and omissions of such individuals is foreseeable, there is no additional requirement that the defendant reasonably foresee the precise amount of dollars which ultimately are involved in the scheme when all the dust settles.

You could have a situation where the—arguably, you could have a situation where the amount of dollars was so excessive that you could not bring it within the purview of 1B1.3. I don't think that's this situation.

This was an ongoing practice over a considerable period of time. It was a great deal of money that went **[92]** through the account, over $8 million. That can produce a sizeable loss. And I think that the entire operation was reasonably foreseeable, and the acts of the other individuals undertaken to advance this criminal activity were reasonably foreseeable by Mr. Meneilly. I make

that finding as part of the Fatico hearing over the objection of defense counsel.

Now, I think the next thing we ought to do is discuss the question of a downward departure; and there has been material submitted, both by the defense and the Government. And the grounds—and counsel will correct me if I'm wrong, but it includes a number of circumstances—and the grounds are that this was aberrant behavior, number one.

Number two, extraordinary family circumstances. And apparently, as part and parcel of those grounds, I'm asked, legitimately, to look at all of the circumstances and determine whether a *Coon* type of downward departure would be in order.

So it seems there's aberrant behavior, extraordinary family circumstances, a number of other items underscored for the Court in the submissions of defense counsel; and the question is, whether any one of those grounds or those grounds in conjunction should be utilized for purposes of a downward departure.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING, DATED AND FILED DECEMBER 3, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 00-1631
Filed December 3, 2001

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the third day of December two thousand one.

Present:

Hon. AMALYA L. KEARSE,

Hon. ROGER J. MINER,

Hon. FRED I. PARKER,

CIRCUIT JUDGES.

Appendix D

USA

v

Meneilly

A petition for panel rehearing having been filed herein by appellant J. Kevin Meneilly,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: ARTHUR M. HELLER
Arthur M. Heller,
Administrative Attorney

APPENDIX E — JUDGMENT OF CONVICTION AND SENTENCE ENTERED SEPTEMBER 15, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—v—

J. KEVIN MENEILLY

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

CASE NUMBER: CR-98-0371-01 (SS-1)(DRH)

AUSA: RUTH NORDENBROOK

Defendant's Attorney & Address
JOSEPH W. RYAN, JR., ESQ.
EAB PLAZA
UNIONDALE, NEW YORK 11556

Appendix E

THE DEFENDANT:

_X_ Was found guilty on counts ONE, TWO, TWELVE, THIRTEEN AND FOURTEEN OF THE SECOND SUPERSEDING INDICTMENT after a plea of not guilty.

Accordingly, the defendant is ADJUDGED guilty of such count(s), which involve the following offenses:

TITLE & SECTION	NATURE & OFFENSE	COUNT NUMBER(S)
18 USC 371	CONSPIRACY TO IMPEDE THE I.R.S.	SS-1, SS-2
26 USC 7206(2)	AIDING TAX FRAUD	SS-12
26 USC 7206(1)	FALSE STATEMENTS ON INCOME TAX RETURNS	SS-13, SS-14

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_X_ The defendant has been found not guilty on count(s) TEN AND ELEVEN OF THE SECOND SUPERSEDING INDICTMENT and is discharged as to such count(s).

_X_ THE REMAINING COUNTS ARE DISMISSED ON MOTION OF THE UNITED STATES.

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_X_ It is ordered that the defendant shall pay to the United States a special assessment of $250.00 ON OR BEFORE December 8, 2000.

It is further ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Sec. Sec #_____

September 6, 2000
Date of Imposition of Sentence

Defendant's Mailing Address:

DENIS R. HURLEY
DENIS R. HURLEY,
UNITED STATES DISTRICT JUDGE

DATED: September 6, 2000
A TRUE COPY ATTEST

Date: September 6, 2000
ROBERT C. HEINEMANN, CLERK
BY: PATRICIA L. BEST, DEPUTY CLERK

Appendix E

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIFTY-SEVEN (57) MONTHS ON COUNTS SS-1 AND SS-2, SUCH SENTENCE TO RUN CONCURRENTLY. THE DEFENDANT IS SENTENCED TO THIRTY-SIX (36) MONTHS ON COUNTS SS-12, SS-13, AND SS-14, SUCH SENTENCE TO RUN CONCURRENTLY FOR A TOTAL TERM OF IMPRISONMENT ON FIFTY-SEVEN (57) MONTHS.

___ The Court makes the following recommendations to the Bureau of Prisons:

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this _____ district,

___ at __ a.m./p.m. on _____.

___ as notified by the Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

___ before 2 p.m. on _____.

___ as notified by the United States Marshal.

___ as notified by the Probation Office.

THE COURT GRANTS THE DEFENDANT'S APPLICATION FOR STAY PENDING APPEAL. THE DEFENDANT IS CONTINUED ON BOND.

Appendix E

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

MICHAEL A. PIZZI, U.S. MARSHAL

By _____

Appendix E

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS ON COUNTS SS-1 AND SS-2, SUCH TERM OF SUPERVISED RELEASE TO RUN CONCURRENTLY. THE DEFENDANT SHALL SERVE A TERM OF SUPERVISED RELEASE OF ONE (1) YEAR ON COUNTS SS-12, SS-13 AND SS-14, SUCH TERM OF SUPERVISED RELEASE TO RUN CONCURRENTLY, FOR A TOTAL TERM OF SUPERVISED RELEASE OF THREE (3) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

**THE DEFENDANT SHALL NOT POSSESS A FIREARM.

**THE DEFENDANT SHALL PROVIDE FULL FINANCIAL DISCLOSURE TO THE PROBATION DEPARTMENT.

**THE DEFENDANT SHALL COMPLY WITH THE ORDER OF RESTITUTION.

**THE FINE IS WAIVED DUE TO THE DEFENDANT'S FINANCIAL INABILITY TO PAY.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Appendix E

RESTITUTION AND FORFEITURE

The defendant shall make restitution to the following persons in the following amounts:

NAME OF PAYEE
U.S. DEPARTMENT OF THE TREASURY

AMOUNT OF RESTITUTION
$40,000.00

Payments of restitution are to be made to:

_X_ The United States Attorney for transfer to the payee.

___ The payee.

Restitution shall be paid:

_X_ in installments according to the following schedule of payments:

THE DEFENDANT SHALL PAY $10,000.00 ON OR BEFORE DECEMBER 8, 2000.

THE REMAINING AMOUNT OF RESTITUTION SHALL BE PAID IN EQUAL MONTHLY INSTALLMENTS OVER THE THREE YEAR PERIOD OF SUPERVISED RELEASE. ANY INTEREST REQUIREMENT IS WAIVED.

ANY PAYMENTS SHALL BE DIVIDED PROPORTIONATELY AMONG THE PAYEES NAMED UNLESS OTHERWISE SPECIFIED HERE.

Appendix E

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each mouth;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

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9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Appendix E

STATEMENT OF REASONS

___ The court adopts the factual findings and guideline application in the presentence report.

___ The court adopts the factual findings and guideline application in the presentence report except AS STATED ON THE RECORD DURING THE FATICO HEARING.

Guideline Range Determined by the Court:

Total Offense Level: 25

Criminal History Category: I

Imprisonment Range: 57 to 71 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 10,000.00 to $ 100,000.00

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

___ Full restitution is not ordered for the following reason(s):

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

___ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

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OR

The sentence departs from the guideline range

____ Upon motion of the government, as a result of defendant's substantial assistance.

____ for the following reason(s):